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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1034.

THE UNITED STATES, PLAINTIFF,

vs.

JOHN D. HALL.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED JULY 10, 1888.

SUPREME COURT OF THE UNITED STATES.

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INDEX.

	Original.	Print.
Indictment	1	1
Demurrer	14	6
Certificate of division in opinion	19	8
Clerk's certificate	22	9

1 UNITED STATES OF AMERICA:

United States circuit court, ninth circuit, district of California.

Indictment.

At a stated term of the said circuit court, begun and holden at the city and county of San Francisco, within and for the district of California, on the second Monday of July, in the year of our Lord one thousand eight hundred and eighty-seven.

The grand jurors of the United States of America, of said circuit court, within and for the district aforesaid, on their oath aforesaid, present that John D. Hall, late of the district of California, heretofore, to wit, on the 3rd day of October, in the year of our Lord one thousand eight hundred and eighty-five, at the city and county of San Francisco, State and district of California, and within the jurisdiction of this honorable court, did knowingly, willfully, and unlawfully falsely make an affidavit for the purpose of defrauding the United States of a large sum of money, to wit, the sum of four thousand nine hundred and fifty-two dollars, more or less, which said affidavit was so knowingly, willfully, and unlawfully falsely made by the said John Derris Hall as aforesaid, in the matter and manner and to the substance and effect following, that is to say: The said John Derris Hall having heretofore, to wit, on the sixteenth day
2 of April in the year of our Lord one thousand eight hundred and eighty-five, then and there being a United States deputy surveyor, entered into a contract with W. H. Brown, then and there being the United States surveyor-general in and for the State of California, whereby the said John Derris Hall, as United States deputy surveyor aforesaid, in substance and effect undertook, agreed, and promised, for and in consideration of the sum of nine dollars per mile for base, standard, meridian, and meander lines, seven dollars per mile for township lines, and five dollars per mile for section lines, except where the lines of survey pass over mountainous land or lands heavily timbered or covered with dense undergrowth, and in such case at the rate of eighteen dollars per mile for base, standard, meridian, and meander lines; sixteen dollars per mile for township lines, and fourteen dollars per mile for section lines for every mile and part of a mile actually run and marked in the field, random lines and offsetts not included, to well, truly, and faithfully, in *in* his own proper person, in strict conformity with the laws of the United States, the printed manual of surveying, and other surveying instructions issued by the Commissioner of the General Land Office, and with such special instructions as he might receive from the surveyor-general in conformity therewith, to survey, mark, and establish the exterior and subdivision lines of
3 35 mile section lines in Tp. (meaning township) 15 N. (meaning north), R. (meaning range) 11 W. (meaning west). 4 miles Tp. (meaning township) and 10 miles section lines in Tp. (meaning township) 22 N. (meaning north) R. (meaning range) 14 W. (meaning west). 3 miles section lines in Tp. (meaning township) 22 N. (meaning north), R. (meaning range) 15 W. (meaning west). 2 miles Tp. (meaning township) and 29 miles section lines in Tp. (meaning township) 23 N. (meaning

north), R. (meaning range) 15 W. (meaning west). 8 miles Indian Reservation and 36 miles section lines in Tp. (meaning township) 24 N. (meaning north), R. (meaning range) 12 W. (meaning west). 4 miles Tp. (meaning township) and 26 miles section lines in Tp. (meaning township) 24 N. (meaning north), R. (meaning range) 16 W. (meaning west). 35 miles section lines in Tp. (meaning township) 24 N. (meaning north), R. (meaning range) 17 W. (meaning west). 2 miles Tp. (meaning township) and 1 mile section lines in Tp. (meaning township) 24 N. (meaning north), R. (meaning range), 19 W. (meaning west). 8 miles Tp. (meaning township) and 15 miles section lines in Tp. (meaning township) 16 N. (meaning north), R. (meaning range) 10 W. (meaning west). 3 miles Tp. (meaning township), and 3 miles section lines in Tp. (meaning township) 20 N. (meaning north), R. (meaning range) 12 W. (meaning west). 7 miles section lines in Tp. (meaning township) 21 N. (meaning north), R. (meaning range) 13 W. (meaning west). 1 mile Tp. (meaning township) 4 and 7 miles section lines in Tp. (meaning township) 21 N. (meaning north), R. (meaning range) 15 W. (meaning west). 9 miles Tp. (meaning township) and 38 miles section lines in Tp. (meaning township) 22 N. (meaning north), R. (meaning range) 16 W. (meaning west). 3½ miles Tp. (meaning township) and 6 miles section lines in Tp. (meaning township) 22 N. (meaning north), R. (meaning range) 17 W. (meaning west). 9 miles Tp. (meaning township) and 25 miles section lines in Tp. (meaning township) 23 N. (meaning north), R. (meaning range) 16 W. (meaning west). ½ mile Tp. (meaning township), 7 miles section lines, and 6 miles Indian reservation lines in Tp. (meaning township) 24 N. (meaning north), R. (meaning range) 13 W. (meaning west). 1½ miles Tp. (meaning township) and 6 miles section lines in Tp. (meaning township) 24 N. (meaning north), R. (meaning range) 15 W. (meaning west). All of Mount Diablo meridian.

And which said lands are more definitely described as follows, to wit: 35 miles section lines in township 15 north, range 11 west. 4 miles township, and 10 miles section lines in township 22 north, range 14 west. 3 miles section lines in township 22 north, range 15 west. 2 miles township, and 29 miles section lines in township 23 north, range 15 west. 8 miles Indian reservation and 36 miles section lines in township 24 north, range 12 west. 4 miles township and 26 miles section lines in township 24 north, range 16 west. 35 miles section lines in township 24 5 north, range 17 west, 2 miles township, and 1 mile section lines in township 24 north, range 19 west. 8 miles township and 15 miles section lines in township 16 north, range 10 west. 3 miles township and 3 miles section lines in township 20 north, range 12 west. 7 miles section lines in township 21 north, range 13 west. 1 mile township and 7 miles section lines in township 21 north, range 15 west. 9 miles township and 38 miles section lines in township 22 north, range 16 west. 3½ miles township and 6 miles section lines in township 22 north, range 17 west. 9 miles township and 25 miles section lines in township 23 north, range 16 west. ½ mile township, 7 miles section lines, and 6 miles Indian reservation lines in township 24 north, range 13 west. 1½ miles township and 6 miles section lines in township 24 north, range 15 west. All of Mount Diablo meridian; and which said lands were public lands of the United States, and were and are situate within the district and

State of California, and that he would complete the surveys in the manner aforesaid, and return the true field notes thereof to the office of the said United States surveyor-general, on or before the 31st day of December, A. D. 1885. (Section 3418 Revised Statutes U. S.)

And it was further expressly stipulated, understood, and agreed by and between the said John Derris Hall, defendant, and United States deputy surveyor as aforesaid, and the said W. H. Brown, United States surveyor-general aforesaid, and made a condition of the contract aforesaid,
6 that the surveys in said contract stipulated to be made should not be commenced before the said John Derris Hall, United States deputy surveyor as aforesaid, and defendant herein, should be officially notified by the United States surveyor-general of the approval of the aforesaid contract by the Commissioner of the General Land Office.

And it was further stipulated, understood, and agreed by and between the said John Derris Hall, United States deputy surveyor aforesaid, defendant herein, and the said W. H. Brown, United States surveyor-general aforesaid, and made a condition of the aforesaid contract that no accounts should be paid for the surveys in said contract stipulated to be made, unless properly certified by the said W. H. Brown in his official capacity aforesaid, and by his (meaning the said W. H. Brown's) successor in office in such official capacity should the said W. H. Brown for any cause cease to be such officer; that such surveys were in accordance with the instructions in said contract stipulated to be observed by him, the said John Derris Hall, and until approved plats and certified transcripts of the field-notes of the surveys to be made by him, the said John Derris Hall, under said contract, and for which accounts should be rendered, were filed in the General Land Office.

And it was further stipulated, understood, and agreed by and between the said John Derris Hall, United States deputy surveyor afore-
7 said, defendent herein, and the said W. H. Brown, United States surveyor-general aforesaid, and made a condition of the aforesaid contract that no payment should be made for the surveys in said contract stipulated to be made by him, the said John Derris Hall, United States deputy surveyor aforesaid, not executed by the said John Derris Hall, United States deputy surveyor aforesaid, in his own proper person, which said contract was duly approved by the Commissioner of the General Land Office on the 27th day of April, A. D. 1885, of which said approval the said John Derris Hall was thereafter officially notified by the said W. H. Brown, United States surveyor-general of the State of California.

And that it became and was necessary, under the terms and conditions of said contract, that the said John Derris Hall in his own proper person, should make an actual survey of the exterior and subdivision lines in the said contract by him stipulated to be made; that said survey should be made by him in strict conformity with the laws of the United States, the printed manual of surveying instructions and other instructions issued by the Commissioner of the General Land Office, and that the said John Derris Hall should return the true field notes of said survey to the office of the United States surveyor-general for California, accompanied by his affidavit and final oath, subscribed and sworn to by him before some officer and competent person authorized to administer oaths by the laws of the

United States, in which said affidavit and final oath he, the said
8 John Derris Hall, was required to state in substance and to the effect that he, the said John Derris Hall, had well, faithfully, and truly, in his own proper person, made an actual survey of the exterior and subdivision lines in said contract stipulated to be made; that the field-notes accompanying and to accompany said affidavit and final oath were true and correct field-notes of such survey, and that he had marked all the corners of said survey and had established and perpetuated the same in strict accordance with the surveying manual and the surveying instructions, and in the specific manner described in said field-notes, before any claim should accrue to him, the said John Derris Hall, against the United States under said contract.

And the said John Derris Hall, with the intent, and for the purpose of defrauding the United States as aforesaid, falsely and fraudulently pretending that he had made the surveys in the aforesaid contract stipulated to be by him, the said John Derris Hall, made in strict conformity with the laws of the United States, the printed manual of surveying instructions and other instructions, issued by the Commissioner of the General Land Office, and in his own proper person, as required by the terms of the aforesaid contract, for the purpose of imposing upon and deceiving the said W. H. Brown, United States surveyor-general aforesaid, in his official capacity aforesaid, and his (meaning the said W. H. Brown's) successor in office in such official capacity aforesaid, should the said W. H. Brown
9 for any cause cease to be such officer aforesaid, and for the purpose of securing the approval of the said pretended survey by the said W. H. Brown in his official capacity as United States surveyor-general aforesaid, and by his (meaning the said W. H. Brown's) successor in office in such official capacity should the said W. H. Brown for any cause cease to be such officer aforesaid, thereto being duly authorized and empowered by law so to do, and for the further purpose of procuring the said W. H. Brown, United States surveyor-general aforesaid, in his official capacity, and his (meaning the said W. H. Brown's) successor in office in such official capacity aforesaid, should the said W. H. Brown for any cause cease to be such officer aforesaid, being thereto authorized and empowered by law so to do, to properly certify and state the accounts and amounts accruing and accrued to the said John Derris Hall, defendant herein, under and by the terms of the aforesaid contract, and to transmit the said stated accounts and amounts accruing and accrued to him, the said John Derris Hall, to the Commissioner of the General Land Office for his approval and allowance, the said Commissioner thereto being authorized and empowered by law so to do, and with the intent and for the purpose of securing payment to him, the said John Derris Hall, from the United States of the contract price agreed to be paid for said survey, according to the terms and the effect of the aforesaid contract, and with the intent and for the pur-
10 pose of corruptly, wickedly, and unlawfully defrauding the United States out of a large sum of money as aforesaid, to wit, the sum of four thousand nine hundred and fifty-two dollars, the said John Derris Hall, defendant herein, heretofore, to wit, on the 3rd day of October, in the year of our Lord one thousand eight hundred and eighty-five, at the city and county of San Francisco, State and district of California, and within the jurisdiction of this honorable court, as United States deputy surveyor aforesaid,

did knowingly, willfully, and unlawfully, falsely make an affidavit and final oath to the field-notes of the aforesaid pretended survey, and did then and there knowingly, willfully, and corruptly make, sign, and execute the aforesaid corrupt affidavit and final oath thereto, wherein and whereby the said John Derris Hall then and there first being duly sworn in that behalf by T. T. Tidball, notary public duly appointed, commissioned, and qualified as such in and for the county of Monterey, California, and then and there being an officer and person competent to administer said oath to the said John Derris Hall, and such oath being then and there taken by the said John Derris Hall as aforesaid, in a case in which a law of the United States authorizes an oath to be administered, he, the said John Derris Hall, did then and there knowingly, willfully, falsely, corruptly, and fraudulently depose, declare, and certify on his oath aforesaid, in substance and effect that he had well, faithfully, and truly in his own proper person made an
11 actual survey of tps. (meaning townships) 15 N. (meaning north), R. (meaning range) 11 W. (meaning west); 16 N. (meaning north), R. (meaning range) 10 W. (meaning west); 20 N. (meaning north), R. (meaning range) 12 W. (meaning west); 21 N. (meaning north), Rs. (meaning ranges) 13 and 15 W. (meaning west); 22 N. (meaning north), Rs. (meaning ranges) 14, 15, 16, and 17 W. (meaning west); 23 N. (meaning north), Rs. (meaning ranges) 15 and 16 W. (meaning west); and 24 N. (meaning north), Rs. (meaning ranges) 12, 13, 14, 15, 16, 17, and 19 W. (meaning west) of the Mount Diablo base and meridian in the State of California, the same being the exterior and subdivision lines of the lands in the aforesaid contract and hereinbefore described; and that the field-notes accompanying, and to accompany the said affidavit and final oath were true and correct field-notes of such survey; and that he had marked all the corners of said survey and had established and perpetuated the same in strict accordance with the surveying manual and the surveying instructions and in the specific manner described in said field-notes, whereas in truth, and in fact, the said John Derris Hall had not well, faithfully, and truly, in his own proper person, made an actual survey of the exterior and subdivision lines of the land last hereinbefore described or at all; and whereas in truth, and in fact, the field-notes accompanying and to accompany the said affidavit and final oath were not true and correct field-notes of said survey; and whereas and in truth, and in fact, he, the said John Derris
12 Hall, had not marked, established, and perpetuated all of the corners of said survey in strict accordance with the surveying manual and the surveying in structions and in the specific manner described in said field-notes; and all of which he, the said John Derris Hall, well knew to be corruptly and wickedly false.

And so the jurors aforesaid, upon their oath aforesaid, do say: That the said John Derris Hall, on the 3rd day of October, in the year of our Lord one thousand eight hundred and eighty-five, at the city and county of San Francisco, State and district of California, and within the jurisdiction of this honorable court, did knowingly, willfully, and unlawfully in the manner and form, and in the matter aforesaid, falsely make an affidavit for the purpose of defrauding the United States of a large sum of money, to wit, the sum of forty-nine hundred and fifty-two dollars, more or less.

Against the peace and dignity of the United States of America, and con-

trary to the form of the statutes of the said United States of America in such case made and provided.

JOHN T. CAREY,
U. S. Attorney.

13 Names of witnesses examined before the said grand jury on finding the foregoing indictment:

John C. Ruddick, Harvey A. Light, James H. Murphy, M. V. Helm, Frank Van Dyke, William McKinney, C. A. Mellville, John D. Hall, Henry Meyrick, jr., C. W. Sawyer, J. W. Fitzpatrick, James H. Crossman, Mrs. Frederick K. Harrison, J. H. Wildes, James R. Maginnis, H. E. Buckley, C. F. Conrad, Frank J. Buckly, Walter K. Slack, Robert White, Joseph Davidson, J. S. O'Neal, John S. Reed, T. T. Tidball, Charles Holcomb, B. W. Childs, M. F. Reilly, George Miller, John A. Robinson, R. P. Hammond, jr., J. R. Mauran, L. D. Craig, Theodore Reichert, W. H. Brown.

(Endorsed:) Indictment for falsely making an affidavit for the purpose of defrauding the United States. A true bill. A. B. Forbes, foreman. Presented and filed in open court this 26 day of November, A. D. 1887. L. S. B. Sawyer, clerk.

14 In the United States circuit court, ninth circuit, district of California.

THE UNITED STATES *vs.* JNO. D. HALL. } No. 2138.

Demurrer.

Now comes the defendant, Jno. D. Hall, in his proper person into court, and having heard read the indictment against him in this case, he saith: That said indictment and the matters and things therein contained, in manner, form, and substance, as the same is herein stated in each and every count of said indictment, is, and the same are, insufficient in law, and that the said defendant is not bound by the law of the land to answer the same, and this he stands ready to verify.

Wherefore, for want of a sufficient indictment herein, the said defendant prays the judgment of this court that he be, by the proper judgment and order of this court, dismissed from said premises in said indictment specified, and that said indictment be declared illegal, invalid, and insufficient.

And said defendant for further grounds and cause of demurrer to said indictment and to all the counts thereof says that said indictment in all the course thereof is insufficient in law; that is to say:

15 1. Because said indictment in each and all of its counts, or in any thereof, does not charge any offense of any kind against the United States or the laws thereof, nor does it charge any act which is made a misdemeanor, felony, or any crime by the laws of the United States; nor does it charge any offense whatever.

2. Because it appears on the face of said indictment that said affidavit was not taken before a competent tribunal, officer, or person having any authority of law to administer said oath or take said affidavit.

3. Because it is not alleged in said indictment that said oath was taken

is a case where a law of the United States authorizes an oath to be administered.

4. Because it is not alleged in said indictment that the statements in said alleged affidavit were or are false.

5. Because it is not alleged in said indictment that the matters and things sworn to in said affidavit was material matter in any issue.

6. Because it is not alleged in said indictment that defendant in said affidavit wilfully and contrary to said oath stated or subscribed to any material matter or any matter which he did not believe to be true.

7. Because said indictment seems to attempt to charge the crime of perjury, but does not allege that wilful and corrupt perjury was committed; nor is there in said indictment any falsification of the statements made in said alleged oath and affidavit.

16 8. Because said indictment does not set out said alleged falsely made affidavit in words and figures, nor does it claim or profess so to do, neither is it stated in said indictment why this is not done.

8½. Because it is not alleged that defendant knew or had any knowledge of any false claim made or to be made by any person, or of any intention on part of any person to defraud the Government, wherein said affidavit could or would be used.

Nor is it alleged who it was that intended to use said affidavit to defraud the United States.

9. Because said indictment seems to attempt to charge perjury or some other offense, the character of which cannot be discovered from said indictment, nor can it be discovered therefrom what said alleged affidavit contained or what it was, as said indictment undertakes to set out the same "in substance and effect" only.

10. Because it appears from the face of said indictment that the alleged affidavit was an illegal and void paper which could not be used in any manner or for any purpose.

11. Because said indictment does not set out said alleged falsely made affidavit in words and figures, nor does it profess or claim so to do.

12. Because said defendant had no authority of law to administer said oath, or take said affidavit, and all his acts in the premises were and are utterly void.

13. Because it does not appear how or in what manner said
17 falsely made affidavit could be or was used to enable any person to obtain money from the United States.

14. Because it appears upon the face of said indictment that the alleged false affidavit of said defendant alleged to have been made to effect the object of said alleged fraud was made before a person having no authority, power, jurisdiction, or competency to administer said affidavit; nor is it alleged that said affidavit contained any material matter or averment; nor does it appear wherein said oath was untrue. And, further, that it appears on the face of said indictment that said affidavit was immaterial to any issue of fact, and was not authorized by any law of the United States.

15. Because it appears from the face of said indictment that the surveys agreed to be made in said contract were made according to law, and in accordance with the terms of said contract, and that said defendant, Hall, was under the state of facts set out in said indictment entitled to receive the sums accruing under said contract.

16. Because it does not appear in said indictment that there was any at-

tempt made by said defendants, or any of them, to secure the approval or payment of any accounts accruing under said contracts, nor that they intended so to do.

17. Because it appears upon the face of said indictment that said defendants, nor any of them, at any time, never attempted or intended in any way or manner to collect any sums of money on said contract except "in accordance with the terms of said contract."

18 18. Because said indictment is ambiguous, uncertain, unintelligible in this: That it does not inform defendant of what he is charged; nor does it sufficiently inform defendant of what he is charged to enable him to prepare for his defense.

Wherefore, defendant prays the judgment and order of this court that said indictment be declared to be insufficient in law, and the same be dismissed, and that this defendant be discharged from the premises to go hence without day.

A. P. VANDUZER,
Attorney for Defendant.

I hereby certify that the foregoing demurrer is well founded in law.

A. P. VANDUZER,
Atty. for dft.

(Endorsed:) Service of the within demr. admitted by copy this 27 day of Dec'r, 1887. John T. Carey, attorney for United States.
Filed Jan'y 27, 1888. L. S. B. Sawyer, clerk.

19 At a stated term, to wit, the February term, A. D. 1888, of the circuit court of the United States of America of the ninth judicial circuit in and for the district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 7th day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The honorable Lorenzo Sawyer, circuit judge; and the honorable George M. Sabin, district judge.

Certificate of opposition of opinion.

THE UNITED STATES OF AMERICA
vs.
JOHN D. HALL. } No. 2138.

This cause was heard upon the indictment in the case and the demurrer thereto, copies of which indictment and demurrer are hereto annexed, and hereby ordered to be made, and made a part of the record of this case on certificate of opposition of opinion.

At the hearing of said case at the present term of this court upon the said papers and record there occurred, as questions arising upon said indictment, demurrer, and record, the following questions, to wit:

1. Do the facts set forth in this indictment constitute an offense
20 under section 5418 of the Revised Statutes of the United States?

2. Do the facts alleged in this indictment constitute an offense under section 5438 of the Revised Statutes of the United States?

3. Are the words "falsely makes," in section 5418, R. S., limited to forged instruments or instruments in the nature of forged instruments?

4. Does the making of a genuine writing or instrument, signed by the party making it or purporting to make it, with his own name, which

instrument is false only in its statement of facts, for the purpose of defrauding the United States, constitute the "falsely making" of a writing or instrument within the meaning of section 5418 of the Revised Statutes?

5. Is it necessary that an instrument "falsely made," purporting to be an affidavit and actually, knowingly used for the purpose of defrauding the United States contrary to the statute, should be sworn to before a person authorized to administer oaths for such purposes in order to constitute an offense under section 5418, R. S.?

6. Is a notary public authorized to administer oaths and take and certify affidavits of the character and for the purposes for which the affidavit set out in the indictment is alleged to have been prepared or used?

Upon which said several questions and upon each of them the opinions of the judges were opposed.

21 Whereupon, on motion of J. T. Carey, esq., United States attorney, on behalf of the United States, that the several points and each of them on which the disagreement happened may during the term be stated under the direction of the judges and certified under the seal of the court to the Supreme Court of the United States to be finally decided, it is ordered that the foregoing statement of the record upon which the case was heard, and of the facts and points of difference which is made under the direction of the judges, be entered of record and be certified accordingly at the request of their said attorney and counsel and in pursuance of the law in such case made and provided.

May 7, 1888.

LORENZO SAWYER,
Circuit Judge.

GEO. M. SABIN,
Dist. Judge, Dist. of Nevada,
Sitting by order of the Circuit Judge.

(Endorsed:) Filed and entered May 7, 1888. L. S. B. Sawyer, clerk.

22 In the circuit court of the United States of the ninth judicial circuit, in and for the district of California.

THE UNITED STATES OF AMERICA
vs.
JOHN D. HALL. } No. 2138.

I, L. S. B. Sawyer, clerk of the circuit court of the United States of America of the ninth judicial circuit, in and for the district of California, do hereby certify that the foregoing twenty-one written pages, numbered from 1 to 21, inclusive, are a full, true, and correct copy of the record and of all proceedings in the above and therein entitled cause, and that the same together constitute the transcript of the certificate of opposition of opinion in said cause.

Witness my hand and the seal of said circuit court this ninth day of June, A. D. 1888.

[SEAL.]

L. S. B. SAWYER,
Clerk.

(Indorsed on cover:) No. 1034. The United States, plaintiff, *vs.* John D. Hall. California C. C. U. S. Filed July 10, 1888.

2180——2

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1036.

THE UNITED STATES, PLAINTIFF,

vs.

M. F. REILLY.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Indictment of M. F. Reilly	1	1
Demurrer	16	7
Certificate of division in opinion	20	8
Clerk's certificate	24	10

1 United States of America. United States circuit court, ninth circuit district of California.

Indictment of M. F. Reilly.

At a stated term of the said circuit court, begun and holden at the city and county of San Francisco, within and for the district of California, on the second Monday of July, in the year of our Lord one thousand eight hundred and eighty-seven.

The grand jurors of the United States of America of said circuit court, within and for the district aforesaid, on their oath aforesaid, present: That M. F. Reilly, late of the district of California, heretofore, to wit, on the fifth day of May, in the year of our Lord one thousand eight hundred and eighty-five, at the city and county of San Francisco, State and district of California, and within the jurisdiction of this honorable court, then and there being a commissioner of the United States circuit court for California, and an officer competent to administer an oath, did knowingly, wilfully, and unlawfully falsely make a certificate over his official signature and under his official seal affixed thereto as commissioner aforesaid, wherein and whereby he, the said M. F. Reilly, did then and there falsely certify in substance and to the effect that Charles Holcomb, then and there being a United States deputy surveyor, on the date last aforesaid appeared before him, the said M. F. Reilly, as commissioner aforesaid, and

2 subscribed and swore to a certain affidavit and final oath to certain field-notes of a certain survey, the said oath purporting to have been taken and administered in a case in which a law of the United States authorizes an oath to be administered, whereas in truth and in fact the said Charles Holcomb did not then and there appear before him, the said M. F. Reilly, as commissioner aforesaid, or otherwise or at all, and subscribe and swear to the aforesaid affidavit, and all of which he, the said M. F. Reilly, well knew, and which said certificate he, the said M. F. Reilly, did then and there knowingly, wilfully, and unlawfully falsely make, as aforesaid, for the purpose of enabling a person other than himself, which said other person's name is to the grand jurors unknown, to directly obtain and receive from the United States a large sum of money, to wit, the sum of twenty-five hundred dollars, more or less, which said certificate was so knowingly, wilfully, and unlawfully falsely made by the said M. F. Reilly as aforesaid, in the matter and in manner and form following: that is to say, John A. Benson and other persons whose names are to the grand jurors unknown, having heretofore, to wit, on the twenty-second day of October, in the year of our Lord one thousand eight hundred and eighty-four, procured and caused a contract to be taken in the name of Charles Holcomb, then and there being a United States deputy surveyor, and from which said contract it was made to appear that the said Charles Holcomb, United States deputy surveyor as aforesaid, had entered

3 into a contract with W. H. Brown, then and there being the United States surveyor-general in and for the State of California, and whereby it was made to appear that the said Charles Holcomb, a United States deputy surveyor, as aforesaid, in substance and effect undertook, agreed, and promised, for and in consideration of the sum of nine ($9)

dollars per mile for base, standard, meridian, and meander lines; seven ($7) dollars per mile for township lines, and five ($5) dollars per mile for section lines, except where the lines of survey pass over mountainous land or lands heavily timbered or covered with dense undergrowth, and in such case at the rate of eighteen ($18) dollars per mile for base, standard, meridian, and meander lines; sixteen ($16) dollars per mile for township lines, and fourteen ($14) dollars per mile for section lines, and every mile and part of a mile actually run and marked in the field, random lines and offsets not included, to well, truly, faithfully, in his own proper person, in strict conformity with the laws of the United States, the printed manual of surveying, and other surveying instructions issued by the Commissioner of the General Land Office, and with such special instructions as he might receive from the surveyor-general in conformity therewith, to survey, mark, and establish the subdivision lines of Tps. (meaning townships) 11, 12, 13, 14, and 15 S. (meaning south), R. (meaning range) 44 E. (meaning east), M. (meaning Mount) D. (meaning Diablo) M. (meaning meridian); Tps. 12, 13, 14, 15, and 16 S. (meaning south), R. 4 (meaning range) 45 E. (meaning east), M. (meaning Mount) D. (meaning Diablo) M. (meaning meridian); Tps. (meaning townships) 12 and 13 S. (meaning south), R. (meaning range) 46 E. (meaning east), M. (meaning Mount) D. (meaning Diablo) M. (meaning meridian); Tps. 30 and 31 N. (meaning north), R. (meaning range) 1 E. (meaning east), S. (meaning San) B. (meaning Bernardino) M. (meaning meridian); Tp. (meaning township) 30 N. (meaning north), R. (meaning range) 2 E. (meaning east), S. (meaning San) B. (meaning Bernardino) M. (meaning meridian), which said lands are more definitely described as follows, to wit: The subdivision lines of townships 11, 12, 13, 14, and 15 south, range 44 east, Mount Diablo meridian; townships 12, 13, 14, 15, and 16 south, range 45 east, Mount Diablo meridian; townships 12 and 13 south, range 46 east, Mount Diablo meridian; townships 30 and 31 north, range 1 east, San Bernardino meridian; township 30 north, range 2 east, San Barnardino meridian; and which said lands were public lands of the United States, and were and are situate within the district and State of California, and that he would complete the surveys in the manner aforesaid, and return the true field-notes thereof to the office of the said United States surveyor-general on or before the thirtieth day of June, A. D. 1885; and from which said contract it is further made to appear that it was further expressly stipulated, understood, and agreed by and between the said Charles Holcomb, United States deputy-surveyor, as afore- 5 said, and the said W. H. Brown, United States surveyor-general aforesaid, and made a condition of said contract that the surveys in said contract stipulated to be made should not be commenced before the said Charles Holcomb, United States deputy-surveyor as aforesaid, should be officially notified by the United States surveyor-general aforesaid of the approval of the aforesaid contract by the Commissioner of the General Land Office. (Section 5421, Revised Statutes, U. S.)

And from which said contract it was further made to appear that it was further expressly stipulated, understood and agreed by and between the said Charles Holcomb, United States deputy-surveyor as aforsaid, and the said W. H. Brown, United States surveyor-general aforesaid, and made a condition of the aforesaid contract, that no accounts should

be paid for the surveys in said contract stipulated to be made, unless it should be properly certified by the said W. H. Brown, in his official capacity as aforesaid, and by his (meaning the said W. H. Brown's) successor in office in such official capacity should the said W. H. Brown for any cause cease to be such officer aforesaid; that such surveys were in accordance with the instruction in said contract stipulated to be observed by him, the said Charles Holcomb, and until approved plats and certified transcripts of the field-notes of the survey to be made by him, the said Charles Holcomb, under said contract, and for which accounts should be rendered, were filed in the General Land Office.

6 And from which said contract it is further made to appear that it was further expressly stipulated, understood and agreed by and between the said Charles Holcomb, United States deputy-surveyor aforesaid, and the said W. H. Brown, United States surveyor-general aforesaid, and made a condition of the aforesaid contract that no payment should be made for the surveys in said contract stipulated to be made by him, the said Charles Holcomb, United States deputy-surveyor aforesaid, not executed by the said Charles Holcomb, United States deputy-surveyor aforesaid, in his own proper person, which said contract was duly approved by the Commissioner of the General Land Office on the twenty-eighth day of November, A. D. 1884.

And that it became and was necessary, under the terms and conditions of said contract, that the said Charles Holcomb, United States deputy-surveyor aforesaid, in his own proper person, should make an actual survey of the subdivision lines in said contract stipulated to be made; and that said survey should be made by him in strict conformity with the laws of the United States, the printed manual of surveying instructions, and other instructions issued by the Commissioner of the General Land Office, and that the said Charles Holcomb should return the true field-notes of said survey to the office of the United States surveyor-general for California, accompanied by his affidavit and final oath, subscribed and sworn to by him before some officer and competent person author-

7 ized to administer oaths by the laws of the United States, in which said affidavit and final oath he, the said Chas. Holcomb, was required to state in substance and to the effect that he, the said Charles Holcomb, had well, faithfully and truly, in his own proper person, made an actual survey of the subdivision lines in said contract stipulated to be made; that the field-notes accompanying and to accompany said affidavit and final oath were true and correct field-notes of said survey, and that he had marked all the corners of said survey and had established and perpetuated the same in strict accordance with the surveying manual and the surveying instructions and in the specific manner described in said field-notes before any claims should accrue to any one against the United States under said contract.

And the said M. F. Reilly, defendant herein, with the intent and for the purpose of enabling a person other than himself, which other said person's name is to the grand jurors unknown, directly to obtain and receive from the United States a large sum of money, to wit, the sum of twenty-five hundred dollars, falsely and fraudulently pretending that Charles Holcomb had made the surveys in the aforesaid contract stipulated to be made in strict conformity with the laws of the United States,

the printed manual of surveying instruction, and other instructions issued by the Commissioner of the General Land Office, and in his the said Charles Holcomb's own proper person, as required by the terms of the aforesaid contract, with the intent and for the purpose of imposing
8 upon and deceiving the said W. H. Brown, United States surveyor-general aforesaid, in his official capacity aforesaid, and his (meaning the said W. H. Brown's) successor in office in such official capacity aforesaid, should the said W. H. Brown for any cause cease to be such officer aforesaid, and for the purpose of securing the approval of the said pretended survey by the said W. H. Brown in his official capacity as United States surveyor-general aforesaid, and by his (meaning the said W. H. Brown's) successor in office, in such official capacity, should the said W. H. Brown for any cause cease to be such officer aforesaid, thereto being duly authorized and empowered by law so to do, and for the further purpose of securing the said W. H. Brown, United States surveyor-general aforesaid, in his official capacity, and his (meaning the said W. H. Brown's) successor in office in such official capacity aforesaid, should the said W. H. Brown for any cause cease to be such officer aforesaid, being thereto authorized and empowered by law so to do, to properly certify and state the accounts and amounts accruing and accrued under and by the terms of the aforesaid contract, and to transmit the said stated accounts and amounts accruing and accrued under and by the terms of the aforesaid contract to the Commissioner of the General Office for his approval and allowance, the said Commissioner thereto being authorized and empowered by law so to do, and with the intent and for the purpose of securing payment to a person other than himself, which said other person's name is to
9 the grand jurors unknown from the United States of the contract price, agreed to be paid for said survey according to the terms and effect of the aforesaid contract, the said M. F. Reilly, defendant herein, heretofore, to wit: On the fifth day of May, in the year of our Lord one thousand eight hundred and eighty-five, at the city and county of San Francisco, State and district of California, and within the jurisdiction of this honorable court, then and there being a commissioner of the United States circuit court for California, and an officer and person competent to administer an oath as aforesaid, did, knowingly, wilfully, and unlawfully, falsely make a certificate over his official signature, and under his official seal affixed thereto as commissioner as aforesaid, wherein and whereby he, the said M. F. Reilly, defendant herein, did then and there falsely certify in substance and to the effect that the said Charles Holcomb, then and there being a United States deputy surveyor as aforesaid, on the date last aforesaid, appeared before him, the said M. F. Reilly, defendant herein as commissioner aforesaid, and subscribed and swore to the affidavit and final oath to the field-notes of said pretended survey, and said oath purporting to have been taken and administered in a case in which a law of the United States authorizes an oath to be administered, by which said affidavit and final oath and the false certificate thereto, made as aforesaid, by the said M. F. Reilly, he, the said Charles Holcomb, is made and represented
10 to have sworn in substance and to the effect that he had well, faithfully, and truly, in his own proper person, and in strict conformity with the instructions furnished by the United States surveyor-general for California, the surveying manual, and the laws of the United States, sur-

veyed all those parts or portions of the retracing of the boundary line between California and Nevada, from closing cor. (meaning corner) to Tps. (meaning townships) 29 and 30 N. (meaning north), Rs. (meaning ranges) 2 E. (meaning east), S. (meaning San) B. (meaning Bernardino) M. (meaning meridian) to closing cor. (meaning corner) to Tps. (meaning townships) 11 S. (meaning south), Rs. (meaning ranges) 43 and 44 E. (meaning east), Mt. (meaning Mount) D. (meaning Diablo) M. (meaning meridian). The subdivision lines of Tps. (meaning townships) 11 S. (meaning south), R. (meaning range) 44 E. (meaning east), Tp. (meaning township) 12 S. (meaning south), Rs. (meaning ranges) 44 and 45 E. (meaning east), Tp. (meaning township) 13 S. (meaning south), Rs. (meaning ranges) 44, 45, and 46 E. (meaning east), and Tps. (meaning townships) 14 and 15 S. (meaning south), Rs. (meaning ranges) 44 and 45 E. (meaning east), and Tp. (meaning township) 16 S. (meaning south), R. (meaning range) 45 E. (meaning east), M. (meaning Mount) D. (meaning Diablo) M. (meaning meridian). Also Tp. (meaning township) 30 N. (meaning north), Rs. (meaning ranges) 1 and 2 E. (meaning east), and Tp. (meaning township) 31 N. (meaning north), R. (meaning range) 1 E. (meaning east), of the San Bernardino base and meridian, in the State of California, as rep-
11 resented in the foregoing field notes (meaning the field notes of the aforesaid pretended survey) as having been surveyed by him, the said Charles Holcomb, and that all the corners of said survey had been established and perpetuated by him, the said Charles Holcomb, in strict accordance with the surveying manual, printed instructions, the special written instructions of the surveyor-general for California, and in the specific manner described in the field-notes (meaning the field-notes of the pretended survey), and that said field-notes are the true field-notes of such survey, whereas in truth, and in fact, the said Charles Holcomb did not then and there appear before him, the said M. F. Reilly, as commissioner aforesaid, or otherwise or at all, and subscribe and swear, in substance and to the effect, that he had well, faithfully, and truly, in his own proper person, and in strict conformity with the instructions furnished by the United States surveyor-general for California, the surveying manual, and the laws of the United States surveyed all those parts or portions of the retracing of the boundary line between California and Nevada from closing cor. (meaning corner) to Tps. (meaning townships) 29 and 30 N. (meaning north), Rs. (meaning ranges) 2 E. (meaning east), S. (meaning San) B. (meaning Bernardino), M. (meaning meridian.) The subdivision lines of Tps. (meaning townships) 11 S. (meaning south), R. (meaning range) 44 E. (meaning east), Tp. (meaning township) 12 S. (meaning south), Rs. (meaning ranges) 44 and 45 E. (meaning east), Tp. (meaning township) 13 S. (meaning south), Rs. (meaning ranges), 44, 45, and 46 E. (meaning east), and Tps. (meaning townships) 14 and 15 S.
12 (meaning south), Rs. (meaning ranges) 44 and 45 E. (meaning east), and Tp. (meaning township) 16 S. (meaning south), R. (meaning range) 45 E. (meaning east), M. (meaning Mount) D. (meaning Diablo), M. (meaning meridian), also Tp. (meaning township). 30 N. (meaning north) Rs. (meaning ranges) 1 and 2 E. (meaning east) and Tp. (meaning township) 31 N. (meaning north), R. (meaning range) 1 E. (meaning east) of the San Bernardino base and meridian, in the State of California, as represented in the foregoing field-notes (meaning the field-notes of the

the printed manual of surveying instruction, and other instructions issued by the Commissioner of the General Land Office, and in his the said Charles Holcomb's own proper person, as required by the terms of the aforesaid contract, with the intent and for the purpose of imposing
8 upon and deceiving the said W. H. Brown, United States surveyor-general aforesaid, in his official capacity aforesaid, and his (meaning the said W. H. Brown's) successor in office in such official capacity aforesaid, should the said W. H. Brown for any cause cease to be such officer aforesaid, and for the purpose of securing the approval of the said pretended survey by the said W. H. Brown in his official capacity as United States surveyor-general aforesaid, and by his (meaning the said W. H. Brown's) successor in office, in such official capacity, should the said W. H. Brown for any cause cease to be such officer aforesaid, thereto being duly authorized and empowered by law so to do, and for the further purpose of securing the said W. H. Brown, United States surveyor-general aforesaid, in his official capacity, and his (meaning the said W. H. Brown's) successor in office in such official capacity aforesaid, should the said W. H. Brown for any cause cease to be such officer aforesaid, being thereto authorized and empowered by law so to do, to properly certify and state the accounts and amounts accruing and accrued under and by the terms of the aforesaid contract, and to transmit the said stated accounts and amounts accruing and accrued under and by the terms of the aforesaid contract to the Commissioner of the General Office for his approval and allowance, the said Commissioner thereto being authorized and empowered by law so to do, and with the intent and for the purpose of securing payment to a person other than himself, which said other person's name is to
9 the grand jurors unknown from the United States of the contract price, agreed to be paid for said survey according to the terms and effect of the aforesaid contract, the said M. F. Reilly, defendant herein, heretofore, to wit: On the fifth day of May, in the year of our Lord one thousand eight hundred and eighty-five, at the city and county of San Francisco, State and district of California, and within the jurisdiction of this honorable court, then and there being a commissioner of the United States circuit court for California, and an officer and person competent to administer an oath as aforesaid, did, knowingly, wilfully, and unlawfully, falsely make a certificate over his official signature, and under his official seal affixed thereto as commissioner as aforesaid, wherein and whereby he, the said M. F. Reilly, defendant herein, did then and there falsely certify in substance and to the effect that the said Charles Holcomb, then and there being a United States deputy surveyor as aforesaid, on the date last aforesaid, appeared before him, the said M. F. Reilly, defendant herein as commissioner aforesaid, and subscribed and swore to the affidavit and final oath to the field-notes of said pretended survey, and said oath purporting to have been taken and administered in a case in which a law of the United States authorizes an oath to be administered, by which said affidavit and final oath and the false certificate thereto, made as aforesaid, by the said M. F. Reilly, he, the said Charles Holcomb, is made and represented
10 to have sworn in substance and to the effect that he had well, faithfully, and truly, in his own proper person, and in strict conformity with the instructions furnished by the United States surveyor-general for California, the surveying manual, and the laws of the United States, sur-

veyed all those parts or portions of the retracing of the boundary line between California and Nevada, from closing cor. (meaning corner) to Tps. (meaning townships) 29 and 30 N. (meaning north), Rs. (meaning ranges) 2 E. (meaning east), S. (meaning San) B. (meaning Bernardino) M. (meaning meridian) to closing cor. (meaning corner) to Tps. (meaning townships) 11 S. (meaning south), Rs. (meaning ranges) 43 and 44 E. (meaning east), Mt. (meaning Mount) D. (meaning Diablo) M. (meaning meridian). The subdivision lines of Tps. (meaning townships) 11 S. (meaning south), R. (meaning range) 44 E. (meaning east), Tp. (meaning township) 12 S. (meaning south), Rs. (meaning ranges) 44 and 45 E. (meaning east), Tp. (meaning township) 13 S. (meaning south), Rs. (meaning ranges) 44, 45, and 46 E. (meaning east), and Tps. (meaning townships) 14 and 15 S. (meaning south), Rs. (meaning ranges) 44 and 45 E. (meaning east), and Tp. (meaning township) 16 S. (meaning south), R. (meaning range) 45 E. (meaning east), M. (meaning Mount) D. (meaning Diablo) M. (meaning meridian). Also Tp. (meaning township) 30 N. (meaning north), Rs. (meaning ranges) 1 and 2 E. (meaning east), and Tp. (meaning township) 31 N. (meaning north), R. (meaning range) 1 E. (meaning east), of the San Bernardino base and meridian, in the State of California, as rep-
11 resented in the foregoing field notes (meaning the field notes of the aforesaid pretended survey) as having been surveyed by him, the said Charles Holcomb, and that all the corners of said survey had been established and perpetuated by him, the said Charles Holcomb, in strict accordance with the surveying manual, printed instructions, the special written instructions of the surveyor-general for California, and in the specific manner described in the field-notes (meaning the field-notes of the pretended survey), and that said field-notes are the true field-notes of such survey, whereas in truth, and in fact, the said Charles Holcomb did not then and there appear before him, the said M. F. Reilly, as commissioner aforesaid, or otherwise or at all, and subscribe and swear, in substance and to the effect, that he had well, faithfully, and truly, in his own proper person, and in strict conformity with the instructions furnished by the United States surveyor-general for California, the surveying manual, and the laws of the United States surveyed all those parts or portions of the retracing of the boundary line between California and Nevada from closing cor. (meaning corner) to Tps. (meaning townships) 29 and 30 N. (meaning north), Rs. (meaning ranges) 2 E. (meaning east), S. (meaning San) B. (meaning Bernardino), M. (meaning meridian.) The subdivision lines of Tps. (meaning townships) 11 S. (meaning south), R. (meaning range) 44 E. (meaning east), Tp. (meaning township) 12 S. (meaning south), Rs. (meaning ranges) 44 and 45 E. (meaning east), Tp. (meaning township) 13 S. (meaning south), Rs. (meaning ranges), 44, 45, and 46 E. (meaning east), and Tps. (meaning townships) 14 and 15 S.
12 (meaning south), Rs. (meaning ranges) 44 and 45 E. (meaning east), and Tp. (meaning township) 16 S. (meaning south), R. (meaning range) 45 E. (meaning east), M. (meaning Mount) D. (meaning Diablo), M. (meaning meridian), also Tp. (meaning township). 30 N. (meaning north) Rs. (meaning ranges) 1 and 2 E. (meaning east) and Tp. (meaning township) 31 N. (meaning north), R. (meaning range) 1 E. (meaning east) of the San Bernardino base and meridian, in the State of California, as represented in the foregoing field-notes (meaning the field-notes of the

aforesaid pretended survey) as having been surveyed by him, the said Charles Holcomb, and that all the corners of the said survey had been established and perpetuated by him, the said Charles Holcomb, in strict accordance with the surveying manual, printed instructions, the special written instructions of the surveyor-general for California, and in the specific manner described in the field-notes (meaning the field-notes of the said pretended survey), and that said field-notes are the true field-notes of such survey; nor to any part thereof, and all of which he and the said M. F. Reilly, defendant herein, well knew, and which said certificate he, the said M. F. Reilly, defendant herein, did then and there, knowingly, willfully, and unlawfully, falsely make, as aforesaid, for the purpose of enabling a person other than himself, which said other person's name is to the grand jurors unknown, directly to obtain and receive from the United States a
13 large sum of money, to wit, the sum of twenty-five hundred dollars, more or less, the same being the amount agreed to be paid to him, the said Chas. Holcomb, as United States deputy surveyor aforesaid, under and by the terms of the aforesaid contract, and he, the said Chas. Holcomb, as United States deputy surveyor aforesaid, having heretofore signed a power of attorney therefor in blank and left the same with one John A. Benson, which he, the said defendant M. F. Reilly, had filled out in the name of the person or persons whose name or names are to be the jurors unknown.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said M. F. Reilly, on the fifth day of May, in the year of our Lord one thousand eight hundred and eighty-five, and in the city and county of San Francisco, State and district of California, and within the jurisdiction of this honorable court, then and there being a commissioner of the United States circuit court for California, and an officer and person competent to administer an oath, did knowingly, wilfully, and unlawfully, falsely make a certificate over his official signature, and under his official seal affixed thereto as commissioner aforesaid, in the manner, and in the form as in this count herein before set forth, for the purpose of enabling a person other than himself, which said other person's name is to the grand jurors unknown, directly to obtain and receive from the United States a large sum of
14 money, to wit, the sum of twenty-five hundred dollars, more or less, the same being the amount agreed to be paid to the said Charles Holcomb, as United States deputy surveyor aforesaid, as under and by the terms of the aforesaid contract.

Against the peace and dignity of the United States of America, and contrary to the form of the statutes of the said United States in such cases made and provided.

JOHN T. CAREY,
U. S. Attorney.

Names of witnesses examined before the said grand jury on finding the foregoing indictment: John C. Ruddick, Harvey A. Light, James H. Murphy, M. V. Helm, Frank Van Dyke, Wm. McKinney, C. A. Melville, John D. Hall, Henry Meyrick, jr., C. W. Sawyer, J. W. Fitzpatrick, James H. Crossman, Mrs. Frederick K. Harrison, J. H. Wildes, Frank J. Buckley, Walter K. Slack, Robert White, Joseph Davidson, J. S. O'Neal, John S. Reed, T. T. Tidball, Charles Holcomb, B. W. Childs, M.

F. Reilly, George Miller, John A. Robinson, R. P. Hammond, jr.,
15 J. R. Mauran, James R. Maginnis, H. E. Buckley, C. F. Conrad, L. D. Craig, Theodore Reichert, W. H. Brown.

(Endorsed:) Indictment for falsely making an certificate for the purpose of enabling another person to obtain and receive a sum of money from the United States. A true bill. A. B. Forbes, foreman. Presented and filed in open court, this 26 day of November, A. D. 1887. L. S. B. Sawyer, Clerk.

16 In the United States circuit court, ninth circuit, district of California.

THE UNITED STATES
vs.
M. F. REILLY.

Demurrer.

Now comes the defendant, M. F. Reilly, in his proper person, into court, and having heard read the indictment against him in this case, he saith: That said indictment and the matters and things therein contained in manner, form, and substance, as the same is therein stated in each and every count of said indictment, is, and the same are, insufficient in law, and that the said defendant is not bound by the law of the land to answer the same, and this he stands ready to verify.

Wherefore, for want of a sufficient indictment herein, the said defendant prays the judgment of this court that he be by the proper judgment and order of this court dismissed from said premises in said indictment specified, and that said indictment be declared illegal, invalid, and insufficient.

II.

And said defendant, for further grounds and cause of demurrer to said indictment and to all the counts thereof, says that said indictment in all the counts thereof is insufficient in law, that is to say:

17 1. Because said indictment in each and all of its counts, or in any thereof, does not charge any offense of any kind against the United States or the laws thereof, nor does it charge any act which is made a misdemeanor, felony, or any crime by the laws of the United States; nor does it charge any offense whatever.

2. Because it is not alleged in said indictment that the affidavit to which said alleged certificate was attached contained any material statement, or that said affidavit or any part thereof was material or necessary to any issue, or that said oath was necessary to be made in order to make any competent proof in any issue or matter or thing in any way connected with the collection of the amounts alleged to be due on said contract.

3. Because said certificate alleged to have been falsely made by said defendant is not set out in words and figures in said indictment, and it is not claimed in said indictment, nor does said indictment profess to set out said alleged certificate in words and figures.

Wherefore, for want of sufficiency in law in said indictment, defendant prays the order and judgment of this court dismissing said indictment and declaring the same to be void and of no effect, and that said defendant go hence.

5. Because said indictment seems to attempt to charge some offense, the character of which can not be discovered from said indictment, nor
18 can it be discovered therefrom what said alleged certificate certificate contained or what it was, as said indictment undertakes to set out the same "in substance and effect" only.

6. Because said indictment does not set out said alleged falsely made certificate in words and figures, nor does it profess or claim so to do, said indictment seeming to charge the crime of forgery.

7. Because the officer before whom said oath is alleged to have been made had no authority of law to administer said oath, or take said affidavit, and all his acts in the premises were and are utterly void.

8. Because said indictment is ambiguous, uncertain, and unintelligible in this: That it does not inform defendant of what he is charged; nor does it sufficiently inform defendant of what he is charged to enable him to prepare for his defense.

Wherefore, defendant prays the judgment and order of this court that said indictment be declared to be insufficient in law, and the same be dismissed, and that this defendant be discharged from the premises, to go hence without day.

A. P. VAN DUZER,
Attorney for Defendant.

I hereby certify that the foregoing demurrer is good and sufficient in law, and is not filed for delay.

A. P. VAN DUZER,
Att'y for Def't.

19 (Endorsed:) Service of the within demurrer admitted by copy this 23d day of April, 1888. John T. Carey, U. S. Att'y.
Filed April 23d, 1888. L. S. B. Sawyer, clerk.

20 At a stated term, to wit, the February term, A. D. 1888, of the circuit court of the United States of America of the ninth judicial circuit, in and for the district of California, held at the court-room in the city and county of San Francisco, on Monday, the 7th day of May, in the year of our Lord one thousand and eight hundred and eighty-eight.

Present: The honorable Lorenzo Sawyer, circuit judge, the honorable George M. Sabin, district judge.

The UNITED STATES OF AMERICA
vs.
M. F. REILLY. } No. 2145.

Certificate of opp. of opinion.

This case was heard upon the indictment in the case, and the demurrer thereto, copies of which indictment and demurrer are hereto annexed and

hereby ordered to be made and made a part of the record of this case on certificate of opposition of opinion.

At the hearing of said case at the present term of this court upon the said papers and record, there occurred as questions arising upon said indictment, demurrer, and record the following questions, to wit:

1. Do the facts set forth in the indictment constitute an offense
21 under section 5421 of the Revised Statutes of the United States?

2. Do the facts set forth in the indictment constitute an offense under that portion of section 5438 of the Revised Statutes of the United States which provides for the punishment of "every person * * * who for the purpose of obtaining or aiding to obtain the payment" "of any claim upon or against the Government of the United States, or any department or officer thereof," "makes * * any false * * certificate or affidavit * * * knowing the same to contain any fraudulent or fictitious statement?"

3. Do the facts set out in the indictment constitute an offense under section 5438 of the Revised Statutes of the United States?

4. Does the knowingly making of a genuine instrument, signed by the officer or party purporting to make it, in his own name, and attested by his official seal, but wholly false in its statement of facts, to be used for any of the purposes prohibited by section 5438 of the Revised Statutes, constitute an offense under that section?

5. Has a commissioner of the United States circuit court authority to administer oaths and make certificates for the purposes for which the certificates set out in the indictment is alleged to have been made and used?

6. Is it necessary to constitute an offense under that section, when the certificate is actually used for any of the purposes prohibited by section 5438, that the officer making it should be lawfully empowered to administer the oath and make the certificate?

22 7. Do the facts as set out in the indictment constitute an offense under any statute of the United States?

8. Is the indictment in this case a good indictment under any of the provisions cited, or under any statute of the United States?

9. Does the knowingly making of a genuine instrument, certificate, paper, or writing, signed by the officer or party purporting to make it, in his own name, attested by his own official seal or otherwise, but wholly false in its statement of facts, to be used for any of the purposes prohibited by section 5421 of the Revised Statutes, constitute an offense under that section?

10. Are the words "falsely makes" in section 5421, R. S., limited to forged instruments and writings in the nature of forged instruments or writings?

Upon which said several questions and upon each of them the opinions of the judges were opposed.

Whereupon, on motion of J. T. Carey, esq., United States attorney, on behalf of the United States, that the several points and each of them on which the disagreement happened, may, during the term, be stated, under the direction of the judges, and certified under the seal of the court to the Supreme Court of the United States to be finally decided, it is ordered, that the foregoing statement of the record upon which the case was heard,

and of the facts and points of difference which is made under the direction of the judges, be entered of record, and be certified accordingly at the request of their said attorney and counsel, and in pursuance of the law in such case made and provided.

23 May 7, 1888.

LORENZO SAWYER,
Circuit Judge.
GEO. M. SABIN,
District Judge Dist. of Nevada,
Sitting by order of the Circuit Judge.

(Endorsed:) Filed and entered May 7, 1888. L. S. B. Sawyer, clerk.

24 In the circuit court of the United States, of the ninth judicial circuit, in and for the district of California.

THE UNITED STATES OF AMERICA
vs.
M. F. REILLY. } No. 2145.

I, L. S. B. Sawyer, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, do hereby certify that the foregoing twenty-three written pages, numbered from 1 to 23, inclusive, are a full, true, and correct copy of the record and of all proceedings in the above and therein entitled cause, and that the same together constitute the transcript on the certificate of opposition of opinion in said cause.

Witness my hand and the seal of said circuit court this ninth day of June, A. D. 1888.

[SEAL.] L. S. B. SAWYER,
Clerk.

(Indorsement on cover:) No. 1036. The United States, plaintiff, vs. M. F. Reilly. California C. C. U. S. Filed July 10, 1888.

[redacted]

In the Supreme Court of the [redacted]

October Term, [redacted]

THE UNITED STATES, PLAINTIFF,
vs.
JOHN D. HALL.

No. [redacted]

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE [redacted] DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE UNITED [redacted]

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, PLAINTIFF,
vs.
JOHN D. HALL. } No. 1034.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

On the 16th of April, 1885, the defendant made a written contract with the United States surveyor-general of California to survey public lands. The work was to be done on or before the 1st day of December, 1885. He did not survey the land at all, but in lieu thereof platted it, and returned the plats, with fictitious field-notes, to the surveyor-general, and had thereto, for the purpose of ob-

taining from the United States the contract price, falsely made an affidavit that he had done the work as required by the instructions and contract. For this false affidavit he was indicted in the circuit court of the United States for the district of California. He demurred to the indictment. On the hearing of the demurrer the judges were opposed in opinion, and certified the questions on which the division occurred, to this court.

POINTS CERTIFIED.

(1) Do the facts set forth in this indictment constitute an offense under section 5418 of the Revised Statutes of the United States?

(2) Do the facts alleged in this indictment constitute an offense under section 5438 of the Revised Statutes of the United States?

(3) Are the words "falsely makes," in section 5418, Revised Statutes, limited to forged instruments, or instruments in the nature of forged instruments?

(4) Does the making of a genuine writing or instrument, signed by the party making it or purporting to make it, with his own name, which instrument is false only in its statement of facts, for the purpose of defrauding the United States, constitute the "falsely making" of a writing or instrument within the meaning of section 5418 of the Revised Statutes?

(5) Is it necessary that an instrument "falsely made," purporting to be an affidavit, and actually, knowingly used for the purpose of defrauding the United States contrary to the statute, should be sworn to before a person authorized to administer oaths for such purposes in order to constitute an offense under section 5418, Revised Statutes?

(6) Is a notary public authorized to administer

oaths and take and certify affidavits of the character and for the purposes for which the affidavit set out in the indictment is alleged to have been prepared or used?'

Upon which said several questions and upon each of them the opinions of the judges were opposed. (Rec., pp. 8, 9.)

BRIEF OF ARGUMENT.

I.

Under section 5418 of the Revised Statutes.

A.

Section 5418 of the Revised Statutes provides:

> SEC. 5418. Every person who falsely makes, alters, forges, or counterfeits any bid, proposal, guarantee, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States, or utters or publishes as true any such false, forged, altered, or counterfeited bid, proposal, guarantee, official bond, public record, affidavit, or other writing, for such purpose, knowing the same to be false, forged, altered, or counterfeited, or transmits to or presents at the office of any officer of the United States any such false, forged, altered, or counterfeited bid, proposal, guarantee, official bond, public record, affidavit, or other writing, knowing the same to be false, forged, altered, or counterfeited for such purpose, shall be imprisoned at hard labor for a period not more than ten years, or be fined not more than one thousand dollars, or be punished by both such fine and imprisonment.

All the allegations necessary to constitute a good indictment under this statute are, that the defendant *knowingly*

and falsely made an affidavit for the purpose of defrauding the United States. If these three elements be sufficiently stated in legal form, and no additional statement which causes it to charge another offense be made in the indictment, it is good. The indictment (Rec., p. 1) states that the defendant—

> (1) Did knowingly, willfully, and unlawfully falsely make an affidavit for the purpose of defrauding the United States of a large sum of money, to wit, the sum of four thousand nine hundred and fifty-two dollars, more or less, which said affidavit was so knowingly, willfully, and unlawfully falsely made by the said John Derris Hall, as aforesaid, in the matter and manner and to the substance and effect following.

This allegation embraces all the elements of the crime, as set forth in the statute. The indictment then proceeds to state the *substance and effect* of the facts, which show the *making* of the *affidavit, and the intent to defraud.*

(2) It states the making of a contract to survey public lands. (Rec., p. 1.)

(3) The substance and effect of that contract is fully and circumstantially set out. (Rec., pp. 1, 2, and 3.)

(4) It alleges that under the terms of the contract, and the laws of the United States, and the instructions issued by the Commissioner of the General Land Office, the defendant was required to return the true field-notes, accompanied by the final oath required by the instructions, to entitle him to claim against the United States his pay for the work. (Rec., p. 3.)

(5) It sets forth the substance and effect of the final oath required. (Rec., p. 4.)

(6) It states his purpose to defraud the United States by falsely pretending he had made the survey, when, in fact, he had not. (Rec., p. 4.)

(7) It alleges the false making of the affidavit and final oath, its signing and execution, setting forth its substance and effect. (Rec., pp. 4 and 5.)

(8) It alleges that the oath was false, and specifies wherein that falsehood consists. (Rec., p. 5.)

All the allegations are sufficiently full and formal if it is sufficient to set forth their substance and effect instead of their tenor.

The indictment in this case sets forth a genuine affidavit in which the affiant is alleged to have sworn to a falsehood. The crime charged is a statutory offense analogous to perjury.

In 2 Bish. Crim. Proc., sec. 915, with reference to perjury, the subject is thus presented:

> Thirdly. *Setting out of the False Testimony:*—
>
> *Substance, not Tenor.*—Whether, as a question depending upon the general principles of criminal pleading, the oral or written words of the witness or affiant must be set out by their tenor, or whether the substance will suffice, is matter upon which there is room for a difference of opinion. It is properly, therefore, remitted for sole determination to authority. The before-recited statute of 23 Geo., 2, c. 11, made it sufficient to "set forth the substance of the offense charged;" and so, by legislative command, is the question settled wherever a like provision is in force. We have seen that, anterior to this statute, the tenor of the record of the cause in which was committed the perjury was not required; so in like manner does it appear not

to have been the universal, or even the common method, to lay the false testimony by its tenor. The entries in Tremaine, for example, instead of setting out the words complained of by their tenor, as in forgery, are in general, not all of them, more nearly after the forms now familiar in cheats and false pretenses; as, to illustrate, "did give in evidence, and did depose, that, &c.," setting out the testimony in a form palpably not its exact words, but the substance and effect of them.

This manner of introducing the testimony is well enough, or, it may be, "in manner and form following, that is to say," an expression which does not require proof of the tenor. Where a statute like the above prevails, or perhaps even where it does not, most pleaders will prefer the statutory word "substance;" or the two words, "substance and effect," which are the more common. No judicious pleader will needlessly say "tenor," because that will compel an uncomfortable exactness in proof.

In the case of *The United States* vs. *Morgan* (1 Morris' Iowa, 342)—an indictment for perjury—Wilson, J. thus ruled:

Nothing farther is now required than a plain statement of the accusation, and setting forth of those matters in which the guilt of the accused is alleged to consist. The indictment should apprise the defendant of what he is called upon to answer. In going thus far courts have but followed the light of reason, but where they go farther than this and say that an indictment is sufficient which does not set forth the circumstances in which the guilt of the accused consists, evils would follow far greater than those which resulted from the decisions of the English courts when they went into the opposite extreme.

In *Campbell* vs. *People* (8 Wendell, 638), which was an indictment for perjury, Sutherland, J., ruled:

> It can not be necessary to set out the whole of the oath. Such parts of it as are alleged to have been false and are material in the given case are all that it can be requisite to state.

In *State of Missouri* vs. *Neal* (42 Mo., 124), which was an indictment for perjury, Fagg, J., states:

> It might be true that a person applying to vote under the provisions of the ordinance, could safely take one part of the oath and not another. A part might be true and a part false. In such a case, if the whole should be taken, the crime would consist alone in taking so much as was untrue, and it would be only necessary to set out so much as embraced the falsehood.

In *Respublica* vs. *Newell* (3 Yeates, 407) the indictment states:

> Whereupon certain interrogatories were then and there drawn up in writing, and proposed to said R. N., esq., in substance as follows, to wit.

The indictment was sustained.

B.

Does the making of a false affidavit constitute the false making of an affidavit contemplated by section 5418 of the Revised Statutes?

The statute is:

> Every person who falsely makes * * * any * * * affidavit or other writing for the purpose of defrauding the United States.

In this sentence the adverb "falsely" seems to qualify the verb "makes;" but the next sentence is:

> Or utters as true any such false * * * affidavit * * * knowing the same to be false, forged, altered, or counterfeit.

If the word "such" were left out of this sentence, the inference would be very strong that if the affidavit was not true, whether genuine or forged, the offense would be committed.

Even with the word "such" in the section, to confine its operation to false or forged writings, the word "true" would have to be interpreted as "genuine," which is not its ordinary signification.

No judicial interpretation of this section in which analogous questions arose has come to my knowledge, and it may be proper to suggest that the language "falsely makes, alters, forges, or counterfeits," is almost identical with the language in which the crime of forgery is described in sections Nos. 5414, 5415, 5416, 5417, 5420, and 5421 of the Revised Statutes.

II.

Under section 5438 *of the Revised Statutes.*

One of the crimes prohibited by section 5438 is thus set forth in the statute:

> Every person who makes, or causes to be made, or presents, or causes to be presented for *payment* or *approval*, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any Department or officer thereof, know-

ing such claim to be false, fictitious, or fraudulent, or *who for the purpose of obtaining or aiding to obtain the payment or approval of such claim makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry* * * * shall be imprisoned at hard labor not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars.

The elements essential to constitute a crime forbidden by this section are—

A fraudulent claim against the United States;

Making an affidavit for the purpose of obtaining, or aiding to obtain, the approval of such claim by any officer of the United States, knowing the same to contain any fraudulent or fictitious statement or entry.

The analysis of this indictment above submitted shows an allegation of a fraudulent claim against the United States; that the defendant made a false affidavit; that the purpose of that affidavit was to obtain, or aid to obtain, the payment or approval of such claim by the Commissioner of the General Land Office, and that the affidavit contained fraudulent and fictitious statements, and was known by the affiant to be fraudulent. All these allegations are so fully stated, that any one could well know the crime with which the defendant was charged, so that a conviction would afford a clear defense to a future prosecution; and it also gave the defendant sufficient information from which he could prepare his defense in this case.

The indictment sets forth a contract, which the Com-

missioner of the General Land Office is required to approve under section 2398, Revised Statutes. Section 2399 makes the general instructions of the Commissioner a part of the contract. Sections 453 and 2478, in connection with sections 2398 and 2399, authorize the Commissioner to give the instructions. Section 2231 requires the final oath to be made to the survey, "according to law and the instructions of the surveyor-general." *Instructions of the surveyor-general*, issued May 3, 1881, provides for the mode of executing the surveys, and on page 46 requires the final oath to be taken.

The final oath referred to in the indictment, and which it purports to set forth in substance and effect, is set out in the instructions of the surveyor-general, as follows:

> I, ——— ———, United States deputy surveyor, do solemnly swear that in pursuance of instructions received from ——— ———, United States surveyor-general for ———, bearing date of the —— day of ———, 18—, I have well, faithfully, and truly, in my own proper person, and in strict conformity with the instructions furnished by the United States surveyor-general for ———, the surveying manual, and the laws of the United States, surveyed all those parts or portions of ——— of the —— base and —— meridian —— in the —— of ——— as are represented in the foregoing field notes as having been surveyed by me and under my directions; and I do further solemnly swear that all the corners of said survey have been established and perpetuated in strict accordance with the surveying manual, printed instructions, the special written instructions of the United States surveyor-general for ———,and in the specific manner described in the

field notes, and that the foregoing are the *true* field notes of such survey; and should any fraud be detected, I will suffer the penalty of perjury under the provisions of an act of Congress approved August 8, 1846.

_____ _____,

United States Deputy Surveyor.

Subscribed and sworn to before me this —— day of ———, 18—.

_____ _____.

_____ _____.

Section 456 of the Revised Statutes requires return to be made to the Commissioner of the General Land Office, and empowers him to audit the amount to be paid on the contract. Section 479 of United States Land Laws, General, page 181, as codified on the 1st of December, 1880, by the commission appointed for that purpose (*vide* also fifth section of the act of the 3d of March, 1857, 11 U. S. Stats., p. 250), authorizes the administration of the oath before "any person authorized by the laws of any State or Territory of the United States to administer oaths, affirmations, or take affidavits."

Paragraph 12,093, section 2093, of the Code and Statutes of California for 1876, authorizes every notary public to administer oaths and affirmations.

The second and sixth points submitted, it is claimed, should therefore be answered in the affirmative; and if the court so holds, the remaining points become immaterial.

G. A. JENKS,
Solicitor-General.

In the Supreme Court of the United States

OCTOBER TERM, 1888.

THE UNITED STATES, PLAINTIFF,
vs.
JOHN D. HALL. } No. 1034.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

In the Supreme Court of the United States

OCTOBER TERM, 1888.

THE UNITED STATES, PLAINTIFF,
vs.
JOHN D. HALL. } No. 1034.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

MOTION TO ADVANCE.

And now, January 7, 1889, comes the United States by the Attorney-General, and moves the court to advance the above-stated case, to be heard at some day convenient to the court at its present term.

The case is a criminal one, and arises on a certificate of division of opinion as to the sufficiency of the indictment.

The questions on which the court divided are:

(1) Do not the facts set forth in this indictment constitute an offense under section 5418 of the Revised Statutes of the United States?

(2) Do the facts alleged in this indictment constitute an offense under section 5438 of the Revised Statutes of the United States?

(3) Are the words "falsely makes," in section 5418, R. S., limited to forged instruments or instruments in the nature of forged instruments?

(4) Does the making of a genuine writing or instrument, signed by the party making it or purporting to make it, with his own name, which instrument is false only in its statement of facts, for the purpose of defrauding the United States, constitute the "falsely making of a writing or instrument within the meaning of section 5418 of the Revised Statutes?

(5) Is it necessary that an instrument "falsely made," purporting to be an affidavit, and actually, knowingly used for the purpose of defrauding the United States contrary to the statute, should be sworn to before a person authorized to administer oaths for such purposes in order to constitute an offense under section 5418, R. S.?

(6) Is a notary public authorized to administer oaths and take and certify affidavits of the character and for the purposes for which the affidavit set out in the indictment is alleged to have been prepared or used?

The defendant is not imprisoned. He is charged with knowingly, willfully, unlawfully and falsely making an affidavit for the purpose of defrauding the United States of a large sum of money by swearing falsely to the performance of a contract for the surveying of public lands, and to the pay vouchers to receive his compensation therefor.

The special reason for the advancement of this cause is that it constitutes one of a class of similar cases, and the

offense one step in a system of alleged frauds perpetrated on the Government concerning the surveying of the public lands. Its advance is suggested by the Secretary of the Interior in the same communication referred to, and in part for the same reasons assigned in the motion for the advancement of case No. 1035, this day made.

A. H. GARLAND,
Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, PLAINTIFF,
vs.
M. F. REILLY.
} No. 1036.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, PLAINTIFF,
vs.
M. F. REILLY. } No. 1036.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

MOTION TO ADVANCE.

And now, January 7, 1889, comes the United States, by the Attorney-General, and moves the court to advance the above-stated case, to be heard at some day convenient to the court during its present term.

The case is a criminal one, and arises on a certificate of division in opinion as to the sufficiency of the indictment.

The questions on which the court divided are:

(1) Do the facts set forth in the indictment constitute an offense under section 5421 of the Revised Statutes of the United States?

(2) Do the facts set forth in the indictment constitute an offense under that portion of section 5438 of the Revised Statutes of the United States, which provides for the punishment of "every person * * * who, for the purpose of obtaining or aiding to obtain the payment" "of any claim upon or against the Government of the United States, or any department or officer thereof," "makes * * * any false * * * certificate or affidavit * * * knowing the same to contain any fraudulent or fictitious statement?"

(3) Do the facts set out in the indictment constitute an offense under section 5438 of the Revised Statutes of the United States?

(4) Does the knowingly making of a genuine instrument, signed by the officer or party purporting to make it, in his own name, and attested by his official seal, but wholly false in its statement of facts, to be used for any of the purposes prohibited by section 5438 of the Revised Statutes, constitute an offense under that section?

(5) Has a commissioner of the United States circuit court authority to administer oaths and make certificates for the purposes for which the certificates set out in the indictment is alleged to have been made and used?

(6) Is it necessary, to constitute an offense under that section, when the certificate is actually used for any of the purposes prohibited by section 5438, that the officer making it should be lawfully empowered to administer the oath and make the certificate?

(7) Do the facts as set out in the indictment constitute an offense under any statute of the United States?

(8) Is the indictment in this case a good indictment under any of the provisions cited, or under any statute of the United States?

(9) Does the knowingly making of a genuine instrument, certificate, paper, or writing, signed by the officer or party purporting to make it in his own name, attested by his own official seal or otherwise, but wholly false in its statement of facts, to be used for any of the purposes prohibited by section 5421 of the Revised Statutes, constitute an offense under that section?

(10) Are the words "falsely makes" in section 5421, R. S., limited to forged instruments and writings in the nature of forged instruments orwritings?

The defendant, who was a commissioner of the circuit court of the United States for California, is charged with having knowingly, willfully, unlawfully, and falsely made a certificate over his official signature, and under his official seal, that one Charles Holcomb, who was a deputy United States surveyor, and who had a contract for the survey of public lands of the United States, had appeared before him and made oath, according to law, to the performance of the terms of his contract, and to pay vouchers to secure his compensation therefor, whereas the said Holcomb had not so appeared, and had not so sworn.

The special reason for the advancement of this cause, is, that it constitutes one of a class of similar cases, and the offense one step in a system of alleged frauds perpetrated on the Government concerning the surveying of the public lands. Its advance is suggested by the Secretary of the Interior in the same communication referred to, and in part for the same reasons assigned in the motion for the advancement of case No. 1035, this day made.

A. H. GARLAND,
Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES
vs. } No. 1,234.
JOHN D. HALL.

On certificate of division in opinion between the judges of the Circuit Court for the District of California.

Upon demurrer to the indictment, the judges of the Circuit Court were divided in opinion upon the question of the sufficiency of the indictment. The defendant, John D. Hall, was indicted for knowingly, willfully, and unlawfully and falsely making an affidavit for the purpose of defrauding the United States out of a sum of money.

The indictment charged that the defendant was a United States Deputy Surveyor; that he had entered into a contract with one W. H. Brown, "then and there being the United States Surveyor General of California," whereby he was bound to survey certain described lands, in his own proper person, fix the courses properly, and return the true field notes thereof all in strict conformity with the laws of the United States, the printed manual of surveying and

other surveying instructions issued by the Commissioner of the General Land Office; that said contract provided that no accounts for such surveying should be paid unless properly certified by the Surveyor General, and until approved plats and certified transcripts of field notes had been filed in the General Land Office, and that said contract had been approved by the Commissioner of the General Land Office. It further charged that, by the terms of the contract, Hall was bound to return the field notes to the Surveyor General, accompanied with his affidavit and final oath, made before some competent officer, that he had in his own proper person, well and truly made an actual survey; that the field notes were true and correct, and that all the corners had been established and perpetuated in strict conformity with the surveying manual and instructions, and that this should be done before any claim should accrue to him against the United States.

It further charged that Hall, with intent to defraud the United States and to deceive the Surveyor General of California and to get accounts properly certified, did, on the 3rd day of October, 1885, at the County of San Francisco, California, before one T. T. Tidball, a notary public, appointed, commissioned and qualified as such in and for the county of *Montery*, California, willfully, unlawfully and falsely make an affidavit and final oath, and did then and there sign the same, whereby he falsely declared that he had well and truly, in his own person, made an actual survey of said lands; that the field notes accompanying said affidavit and final oath were true and correct field notes of such survey; that he had marked all the corners of said survey and established

and perpetuated the same in accordance with the surveying manual and instructions, and in the specific manner described in said field notes, "whereas, in truth and fact, said John Derris Hall had not well, faithfully and truly, in his own person, made an actual survey of the exterior and subdivision lines of the land last hereinbefore described, or at all; and, whereas, in truth and in fact, the field notes accompanying and to accompany the said affidavit and final oath were not true and correct field notes of said survey; and, whereas, in truth and in fact, he, the said John Derris Hall, had not marked, established and perpetuated all of the corners of said survey in strict accordance with the surveying manual and the surveying instructions, and in the specific manner described in the field notes; and all of which he, the said John Derris Hall, well knew to be corruptly and wickedly false."

The first question upon which the judges differed is thus stated by them:

"Do the facts set forth in this indictment constitute an offence under section 5418 of the Revised Statutes of the United States?"

That section is as follows:

"SEC. 5418. Every person who falsely makes, alters, forges, or counterfeits any bid, proposal, guarantee, official bond, public record, affidavit or other writing, for the purpose of defrauding the United States, or utters or publishes as true, any such false, forged, or counterfeited bid, proposal, guarantee, official bond, public record, or other writing, for such purpose, knowing the same to be false, forged, altered or counterfeited, or transmits to or presents at the office of any officer of the United

States any such false, forged, altered or counterfeited bid, proposal, guaranty, official bond, public record, affidavit, or other writing, knowing the same to be false, forged, altered, or counterfeited, for such purpose, shall be imprisoned at hard labor for a period not more than ten years, or be fined not more than one thousand dollars, or be punished by both such fine and imprisonment."

A careful reading of this statute will satisfy any judicial mind that the offence intended to be punished by this section is that of forgery. It is the falsely making,—that is forging an affidavit and certificate, and not the embodying of a false statement of facts in a genuine affidavit made by an actual party with his genuine signature, that is forbidden.

This will appear from the following considerations:

1. The word "makes" occurs with the words, "alters," "forges," or counterfeits," the apt words used at common law and in most statutes to define the crime of forgery. *Noscitur a sociis.*

2. The instruments besides affidavits which may be falsely made and which are named in the statute are "bids," "proposals," "guarantees," "official bonds," "public records," and "other writings," being instruments which do not require any oath, and as to which the offence is complete when they are "falsely made."

3. The second clause of the section prohibits the "uttering or publishing" as true any such instruments, which are words almost exclusively employed in connection with the crime of forgery.

4. And this is the construction which has been given to the section by the courts whenever the question has been made.

In the *United States* vs. *Wentworth*, 11 Federal Rep., 55, a similar statute was before the United States Circuit Court for the district of New Hampshire. In that case, as in this, the defendant was indicted for falsely making certain affidavits. The affidavits were genuine in their execution, but false in their statement of facts.

The court said, "What then is this statute? Is it perjury or forgery, or both? It is in these words:

"That if any person or persons shall falsely make, alter, forge or counterfeit, or cause or procure to be falsely made, altered or counterfeited, or willingly aid or assist in the false making, altering, forging, or counterfeiting any bond, bid, proposal, guaranty, security, official bond, public record, affidavit or other writing, for the purpose of defrauding the United States, etc.

"The indictments in this case seemed to have been formed upon the idea that the *false making* mentioned in the statute was in the nature of perjury, because, after reciting the affidavits, they go on to allege in what particulars they were false. But we are satisfied that it is not the true construction of the statute. A little analysis and attention to its language makes this apparent. It says, "If any person shall falsely make, alter, forge, or conterfeit? Now the arrangement and connection of these words, putting the 'false making' with other apt words to describe forgery, to wit: altering, forging, counterfeiting, indicate its true intent and meaning, that it is aimed at forgery and not at perjury. Again, 'if any person shall falsely make, alter, forge, or counterfeit any bond,' bid, etc. Now, what is the false making of a bond or bid? Certainly not taking a false oath, because the execution of a bond or bid requires no oath. To falsely make an affidavit is one thing; to make a false affidavit is another.

"A person may falsely make an affidavit, every sentence of which may be true in fact. Or he may actually make an affidavit, every sentence of which shall be false. It is the '*false making*' which the statute makes an offense, and this is forgery as described in all the elementary books. "Hawkins says, (chapter 70, § 1:) 'Forgery, by the common law, seemeth to be an offense in *falsely and fraudulently making or altering any matter* of record, etc."

Chitty follows Hawkins, (Vol. 3, p. 1022):

"Forgery may be defined to be the false 'making.' Blackstone defines it to the *fraudulent making*. Vol. 4, p. 242.

"Russell (Vol. 2, p. 318), says not only the fabrication and false making constitute the crime, but the alteration, &c. Wharton quotes Blackstone and East, and calls it the *false making*. 2 Whart, §1418. Roscoe, the same. Crim. Ev., 487.

"The allegation and proof required by the respondents' counsel was not necessary, for it is quite evident an affidavit might be falsely made when no oath whatever might have been taken.

"But it is also contended, by the respondents' counsel, that these indictments are bad because they profess to set out the affidavits only in their substance, and not in words and figures, or other apt words to indicate that they are literally copied. The words of the indictment are: 'Which said false and fraudulent affidavit and writing was then and there of the *substance* following,—that is to say;' and the court think that is not sufficient. The offence described in the statute on which these indictments are founded is forgery, and it has always been held necessary in such cases to set out the paper alleged to be forged.

"The statute (2 and 3, Wm., p. 4, c. 123), would seem to have obviated that necessity in England, but it has no effect here. The authorities are very numerous and uniform. Arch. Cr. Pl. and Ev., 42, and cases there cited: 2 Whart., 1468; 1 Whart., 306;

2 Russ., 374; 1 Chit., 230; *State* vs. *Bryant*, 17 N. H., 323; *Com.* vs. *Houghton*, 8 Mass., 107; *State* vs. *Parker*, 1 Chit., 293; *People* vs. *Kingsley*, 2 Cow., 522; *U. S.* vs. *Britton*, 2 Mason, 464."

This indictment is bad, under section 5418, because it does not show that any contract was made by the defendant with any person who had authority to bind the United States. There is no allegation that the contract was made with W. H. Brown in his *official capacity* as Surveyor General of California. The allegation is that the defendant "entered into a contract with W. H. Brown, then and there being the United States Surveyor General of California." This is mere *descriptio personae*. The contract is then set out. It does not state, as it ought to have done, that it was made with him *officially*. The pleader in other parts of the indictment has been careful to state expressly that the said W. H. Brown should act in his official capacity upon certain matters therein referred to. Thus, in reference to imposing upon and deceiving the Survey or General, it is alleged that it was done for the purpose of deceiving the said W. H. Brown, "Surveyor General, *in his official capacity* aforesaid, and his successor in office."

If it were necessary in regard to these matters, which were incidents to the contract, to allege that Brown was to act in his official capacity, it seems to us that it was much more necessary in the matter of the making of the contract, which was the foundation of the whole thing.

Again, this indictment is bad, because it does not allege such a state of fact as shows that the United States could be made liable for the survey of the lands described in the indictment.

It is not every character of land that the United States is bound to pay for survey. All mineral lands, except township ~~sites~~ lines, must be surveyed by United States Deputy Surveyors, but payment must be made by the parties interested. (R. S., Sec. 2, 334.)

It does not appear from this indictment that the lands are not mineral.

The only allegation is that they were public lands; mineral lands ~~and~~ are public lands. If these lands were mineral the surveyor general of California had no legal authority to bind the United States for their survey, and therefore the alleged conduct of the defendant could not have defrauded the United States. And for this reason the indictment should have shown that they were not mineral lands.

The indictment should have negatived any presumption that might arise from the provisions of Rev. Stat., sec. 2401. It should have contained a statement of facts which were entirely inconsistent with the innocence of the defendant, and which showed that the United States must have been defrauded if the defendant had committed the acts charged in the indictment. Section 2401 provides for surveys of townships without costs or any liability on the part of the Government, whenever the settlers desire a survey and deposit to the credit of the United States, in some United States depository, a sum sufficient to pay for such survey. *Non constat* that this had not been done in this case.

The second question, upon which the judges differed, is as follows:

"Do the facts alleged in this indictment constitute an offence under Section 5438 of the Revised Statutes of the United States?"

That section reads thus:

"SEC. 5438. Every person who makes or causes to be made, or presents or causes to be presented for payment or approval to or by any person or officer in the civil, military, or naval service of the United States any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim makes, uses, causes to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States," &c.

This indictment is framed under Section 5418, as is stated in the indictment. It would be exceedingly strange if, framed under that section, it by chance happened to meet all the requirements of another and different section defining another and different offense. An indictment founded upon section 5438 would be required to set out with *particularity* and *certainty* the *precise* claim which was alleged to be false, fictitious, or fraudulent, the *precise* manner in which such claim was sought to be paid or approved, the *precise* contents of the affidavit alleged to be false, and the *precise* portions thereof which were claimed to be fictitious or fraudulent, and we think it would be necessary to allege that such affidavit had, in some manner, been used to obtain the approval or payment of the false claim.

Tested by these considerations, this indictment is bad.

The only claim in this section 5438, which can apply to this case, is the following, "or who for the purpose of obtaining, or aiding to obtain, the payment or approval of such claim makes, uses, causes to be made or used any false affidavit * * * * knowing the same to contain any false or fictitious statement or entry," &c.

The making or using of such an affidavit must be in a case where the United States was liable, and therefore could be defrauded. We have already endeavored to show that the United States could not be defrauded in this case, because the contract was not made with Brown in his official capacity.

The affidavit referred to must be one made before competent authority. This one was not.

This oath was administered by an incompetent officer, to wit, a notary public. Such an officer has no authority under the laws of the United States to administer an oath. *United States* vs. *Curtis*, 107 U. S. 671. This oath was administered *at the County of San Francisco by a notary public who was appointed, commissioned and qualified as a notary within and for the County of Monterey.* The indictment so avers. Surely a notary cannot act officially outside of the County for which he was appointed, no more than he can act outside of the State which appointed him. He cannot make a notarial protest or take the acknowledgment of a deed outside of his County or State. Cook Law 1181

And the indictment must set out the affidavit so that the court can see whether it is such an affidavit as is within the statutes.

United States vs. *Noelke*, 17 Blatch., 560;
United States vs. *Bennett*, 16 Blatch., 338;
Bradlaugh vs. *The Queen*, L. Rep., 32, B., 627;
Rex vs. *Taylor*, 1 Camp, 404;
Coppick vs. *The State*, 36 Md., 513;
Bishop C. P., 1 ed., § 845;
2 Bishop C. L., 3d ed., § 915, note.

The third question, upon which the Judges differed is, that stated by them:

"Are the words 'falsely made' in section 5418, R. S., limited to forged instruments, or instruments in the nature of forged instruments?"

From what has already been said in this brief, we think the answer should be in the affirmative.

The fourth question is as follows:

"Does the making of a genuine writing or instrument, signed by the party making it, with his own name, which instrument is false only in its statement of facts, for the purpose of defrauding the United States, constitute the 'falsely making' of a writing or instrument within the meaning of section 5418 of the Revised Statutes?"

We have already shown, as we think, that this question should be answered in the negative.

The fifth section is as follows:

"Is it necessary that an instrument 'falsely made' purporting to be an affidavit and actually and knowingly used for the purpose of defrauding the United States contrary to the statute, should be sworn to be for a person authorized to administer oaths for such purposes in order to constitute an offense under section 5418, R. S.?"

We object to this question, because it implies more than is alleged in this indictment. There is no averment that the affidavit was "actually and knowingly used for the purpose of defrauding the United States," or for any other purpose. The only allegations relate to the "falsely making" of the affidavits.

But assuming that the question is a proper one, then we think it should be answered in the affirmative. The word, affidavit, *ex vi termini*, signifies a written statement under oath.

An oath is an obligation to speak the truth imposed by some competent authority.

A written statement, purporting, on its face, to be sworn to before a minister of the gospel, could not properly be called an affidavit.

It would be a solemn statement, but not an affidavit. No lawyer would for a moment think of describing it as an affidavit, and why? Because on its face it would show that the person purporting to administer the obligation of an oath had no authority in law so to do.

It would negative the inherent legal conception of an affidavit as a written statement made under the obligation of a valid oath. In the nature of the case there can be no such thing as a valid oath unless the person imposing it had the legal authority to administer it, and we think there can be no such thing as an affidavit, in legal contemplation, unless it be supported by a *valid* oath.

The only remaining question propounded by the judges is the following:

"Is a notary public authorized to administer oaths and take and certify affidavits of the character and for the purposes for which the affidavit set out in the indictment is alleged to have been prepared and used?"

The decision of this Court, in the case of the *United States* vs. *Curtis*, 107 U. S., 671, *supra*, answers the question in the negative.

The Solicitor General in his brief upon this point refers to the 5th section of the act of March 3, 1857, 11 Stat., 250, as giving authority to a notary to administer the oath; but the court will find by reference to that statute that it applies only to cases "effecting *any right claim, or title, or any contest therefor, to any of the public lands of the United States.*"

Repealed R.S.5596,

THE UNITED STATES
vs.
M. F. REILLY. } No. 1,036.

This case also comes here upon a certificate of division of opinion of the judges of the United States Circuit Court for the District of California, and as it has some features in common with No. 1034, just considered, we shall include them both in the same brief.

The indictment charges that the defendant, on the 5th of May, 1885, was a Commissioner of the United States Circuit Court for California, and an officer competent to administer an oath, and that he did knowingly, willfully and unlawfully, falsely make a certificate over his official signature and affix thereto

his official seal as Commissioner, and thereby falsely certified in substance and to the effect that Charles Holcomb, then and there being a United States Deputy Surveyor on the date aforesaid had appeared before him as Commissioner, and subscribed and sworn to a certain affidavit and final oath to certain field notes of a certain survey, when in truth and fact the said Charles Holcomb did not then and there appear before him and subscribe and swear to said affidavit, and which certificate was made for the purpose of enabling a person other than himself, and to the jurors unknown, to obtain and receive from the United States a large sum of money to wit, $2,500. The indictment further charges that John A. Benson and other unknown persons had procured a contract to be taken in the name of Charles Holcomb, a Deputy United States Surveyor, with "W. H. Brown, then and there being the United States Surveyor General in and for the State of California," whereby the said Holcomb, in substance and effect, undertook and agreed to make a survey of certain lands for an agreed consideration.

The indictment then proceeds to set out the contract, in substantially the same language as that used in the case against Hall, No. 1034, and to charge that the defendant, with the intent before stated, falsely and fraudulently pretended that the said Holcomb had made the surveys in the contract stipulated and in conformity with the laws of the United States, with intent of imposing upon the said Brown, in his official capacity and inducing him to certify and state the accounts and amounts under said contract; and to transmit the same to the Commissioner of the General Land Office for his approval,

with intent to secure payment to a person other than himself, to the jurors unknown.

The indictment proceeds to set out with particularity the lands alleged to have been surveyed, and repeats the manner in which and the intent with which it was done, and concludes its charging part with the allegation that Holcomb had a power of attorney in blank, and left the same with one John A. Benson, which the defendant, Reilly, had filled out in the name of a person, or persons, to the jurors unknown.

The indictment, on its face, purports to be founded on Section 5421 Revised Statutes.

That section is as follows:

"SEC. 5421. Every person who falsely makes, alters, forges, or counterfeits, or causes or procures to be falsely made, altered, forged or counterfeited, or willingly aids or assists in the false making, altering, forging, or counterfeiting, any deed, power of attorney, order, certificate, receipts or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly to obtain or receive from the United States, or any of their officers or agents, any sum of money; or who utter or publish as true, or cause to be uttered or published as true, any such false, forged, altered, or counterfeited deed, power of attorney, order, certificate, receipt, or other writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, or who transmits to, or presents at, or causes or procures to be transmitted to, or presented at, any office or officer of the Government of the United States, any deed, power of attorney, order, certificate, receipt, or other writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or

counterfeited, shall be imprisoned at hard labor for a period of not less than one year nor more than ten years; or shall be imprisoned not more than five years, and fined not more than one thousand dollars."

The first question upon which the judges differed, is the following:

"Do the facts set forth in the indictment constitute an offense under section 5421 of the Revised Statutes of the United States?"

This should be answered in the negative. The offense covered by this section is forgery, and this indictment as an indictment for forgery is clearly bad, for the reasons stated in case No. 1034, and for the additional reason that forgery cannot be predicated upon a genuine instrument made by the party charged.

A person cannot forge his own promissory note or other writing. The instrument cannot be genuine and at the same time forged.

Second question:

"Do the facts set forth in the indictment constitute an offense under that portion of section 5438 of the Revised Statutes of the United States, which provides for the punishment of 'every person * * * who, for the purpose of obtaining, or aiding to obtain, the payment' of any claim upon or against the Government of the United States or any Department or officer thereof, 'makes' * * * any false * * * certificate or affidavit * * * knowing the same to contain any fraudulent or fictitious statement?"

As we had occasion to say, in the other case, it would be something very uncommon and highly improbable that an indictment founded on one section

of the statute should accidently and unintentionally contain all the averments necessary to make it a good indictment under another section creating a different offense.

It may be that a defendant, in such a case, would be required to prepare his defense, against all possible views that the government could present against him; but it certainly would be more than is generally done.

This indictment is not good under section 5438, because it does not show that the claim made was a false claim, which is the first thing to be alleged. It does not aver that Holcomb had not made surveys called for in the contract. The only allegation is that the defendant falsely pretended that Holcomb had made the surveys. That is not the clear and certain averment of the fact required by the law.

The only other allegation upon the subject is in said affidavit. Holcomb is made and represented to have sworn that he had well and truly made the survey, established the corners, &c., "whereas in truth and fact the said Charles Holcomb did not then and there appear before the said M. F. Reilly as commissioner aforesaid, or otherwise, or at all, and subscribe and swear in substance, and to the effect that he had well, faithfully and truly, in his own proper person and in strict conformity with the instructions," &c., negativing the allegations of the affidavit. This is not sufficient.

The third question is answered by the answer to the second.

The fourth question is answered by what has been already said in this brief.

We are unable to find any authority for a Commissioner of the United States Circuit Court to administer oaths and make certificates for the purposes stated. Question 5.

Question 6. "Is it necessary to constitute an offense under that section, when the certificate is actually used for any of the purposes prohibited by section 5438 that the officer making it should be lawfully empowered to administer the oath and make the certificate?

When oaths and certificates are referred to in a statute, it must be understood that they are what in law are called, oaths and certificates. There can be no oath unless it has been imposed by competent authority, and there can be no certificate in legal contemplation unless it is one which the law recognizes. A paper purporting to be a certificate, if signed by a person unauthorized, is not a certificate. A statement at the end of a deposition by a physician that it had besn subscribed and sworn to before him, would not be such a certificate as would be entitled to any consideration. It would not be an instrument known to the law.

Seventeenth question. "Do the facts as set out in the indictment constitute an offense under any statute of the United States."

We submit that this Court will not make an examination of all the criminal laws to ascertain if there be any that will sustain this indictment. We venture the opinion that this is the first time that such a question has been submitted to this Court. Its time is sufficiently occupied in answering ques-

tions that are specific and confined to those which relate to specific statutes.

The eighth question is answered by the above.

The ninth and tenth questions are answered by the authorities already cited to show that the instruments which are "falsely made" and referred to in section 5421, are those which are forged and not those which are genuine, but contain a false-statement of facts.

Respectfully submitted,

FRANK H. HURD

WALTER H. SMITH,

March 14, 1889. *Atty's for Def'ts.*

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Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES
vs.
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No. 1036.

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No. 1034.

Additional Briefs for Defendants.

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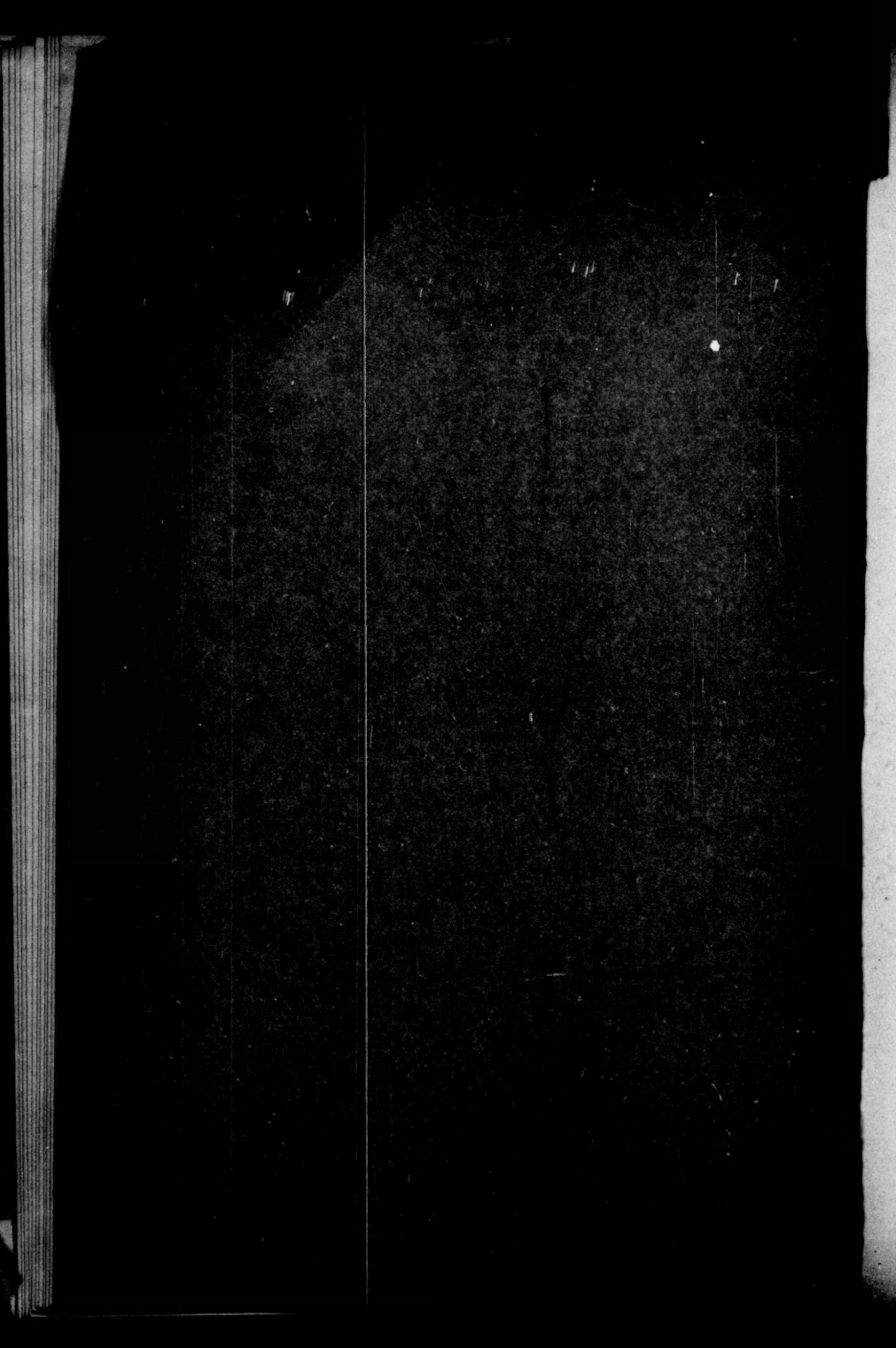

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES
v.
M. F. REILLY.
No. 1036.

ADDITIONAL BRIEF FOR DEFENDANT.

On certificate of division in opinion between the Judges of the Circuit Court for the District of California.

The indictment in this case appears to have utterly confounded the judges. They have submitted ten questions to this Court to ascertain, if it can, under what statute the indictment was found, and significantly inquire in the seventh question:

"Do the facts as set out in the indictment constitute an offense under any statute of the United States?"

If this Court undertakes to answer that question by examining all the statutes of the United States for the purpose of informing the district attorney and the court below what law has been violated, the decision will be with-

out a precedent and will greatly encourage loose and uncertain pleading.

"An indictment so far lacking adherence to statutory terms that the court cannot see on which of two statutes it is drawn, is ill."

1 Bish. Crim. Proc., sec. 612, and cases cited.

The first question submitted by the judges is:

"Do the facts set forth in the indictment constitute an offense under section 5421 of the Revised Statutes of the United States?"

The charge in the indictment is that defendant Reilly did knowingly, wilfully, and unlawfully, falsely make a certificate to the effect that Charles Holcomb, a United States deputy surveyor and contractor for surveying public lands, appeared before him (Reilly) and took and subscribed an oath to an affidavit, which affidavit stated that Holcomb had complied with a contract to survey certain public lands.

Section 5421 defines the crime of forgery, which is the *falsely making* of a writing, and not the offense of making a false paper. If any offense is described in the indictment it is the offense of forgery, but the facts stated do not constitute the crime of forgery. It is alleged that the certificate was made and signed by the defendant Reilly himself, and whether the facts stated in it were true or false the making of it was the genuine act of defendant Reilly; in other words, the certificate is just what it purports to be and is not altered, forged or counterfeited.

The second question submitted is:

"Do the facts set forth in the indictment constitute an offense under that portion of section 5438 of the Revised Statutes of the United States which provides for the punishment of 'every person * * * who, for the purpose

of obtaining or aiding to obtain the payment' 'of any claim upon or against the Government of the United States, or any department or officer thereof,' 'makes * * * any false * * * certificate or affidavit * * * knowing the same to contain any fraudulent or fictitious statement?"

The offense described in section 5438 of the Revised Statutes is the presenting, for payment or approval to an officer of the United States, a false, fictitious, or fraudulent claim, knowing it to be such, or making any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, for the purpose of obtaining, or aiding to obtain, the payment or approval of such false claim, knowing that such bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition contains any fraudulent or fictitious statement or entry.

The certificate, affidavit, or deposition mentioned in this section is one not falsely made, but is a genuine document containing fraudulent or fictitious statements, and is not the falsely-made certificate described in the indictment.

The second question submitted by the judges does not contain all of the material words of the statute describing the offense sought to be charged under section 5438. The portion of the section relating to this matter is as follows:

"SEC. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer * * * of the United States, *any claim* upon or against the Government of the United States, or any department or officer thereof, *knowing* SUCH CLAIM *to be false, fictitious, or fraudulent*, or who, for the purpose of obtaining or aiding to obtain the payment or approval *of such claim*, makes * * * any false certificate, knowing the same to contain any fraudulent or fictitious statement or entry," &c.

It is not alleged in the indictment that defendant Reilly knew that Holcomb's claim for surveying was false, fictitious, or fraudulent, or that such claim was in fact either false, fictitious, or fraudulent, nor is it alleged in the indictment that the affidavit of Holcomb, to which the certificate of defendant Reilly was attached, was false, fictitious, or fraudulent—the only charge being that defendant Reilly falsely made a certificate—reciting that Holcomb appeared before him at a certain time and place and made an affidavit, which affidavit was to be used to secure the approval of his (Holcomb's) survey.

The third question submitted is:

"Do the facts set out in the indictment constitute an offense under section 5438 of the Revised Statutes of the United States?"

This question must be answered in the negative, and the answer to it will show that no offense whatever is charged in the indictment under any statute of the United States.

The only charge is that the certificate to the affidavit was falsely made in that Holcomb did not then and there appear before defendant Reilly, commissioner, or otherwise, or at all, and subscribe and swear to the affidavit.

This is not an allegation that Holcomb did not at any time or place appear before defendant Reilly and subscribe and swear to the affidavit.

Reilly was a commissioner of the circuit court for the district of California. The affidavit could as well have been made in any other part of the State as in San Francisco, and in that case Holcomb would not have appeared before Reilly then and there (*i. e.*, in San Francisco), or otherwise, or at all.

An examination of the indictment will show that there

is no allegation whatever that Holcomb did not subscribe and swear to the affidavit in manner and form as certified to by defendant Reilly.

The indictment charges that—

"M. F. Reilly, * * * being a commissioner of the United States circuit court for California, * * * did knowingly, wilfully, and unlawfully falsely make a certificate over his official signature and under his official seal affixed thereto as commissioner aforesaid, wherein and whereby he, the said M. F. Reilly, did then and there falsely certify in substance and to the effect that Charles Holcomb, then and there being a United States deputy surveyor, on the date last aforesaid appeared before him, the said M. F. Reilly, as commissioner aforesaid, and subscribed and swore to a certain affidavit and final oath to certain field-notes of a certain survey, * * * whereas, in truth and in fact, the said Charles Holcomb did not then and there appear before him, the said M. F. Reilly, as commissioner aforesaid, or otherwise, or at all, and subscribe and swear to the aforesaid affidavit, * * * which said certificate was so knowingly, wilfully, and unlawfully falsely made by the said M. F. Reilly aforesaid, in the *matter* and in manner and form following," &c.

The indictment then sets out the contract to survey certain public lands, with regard to which the affidavit certified to by defendant Reilly was made. It then alleges that—

"Said M. F. Reilly, defendant herein, with the intent and for the purpose of enabling a person other than himself * * * directly to obtain and receive from the United States a large sum of money, * * * falsely and fraudulently pretending that Charles Holcomb had made the surveys in the aforesaid contract stipulated to be made, * * * the said M. F. Reilly, defendant herein, heretofore, to wit, on the fifth day of May, in the year of our Lord one thousand eight hundred and eighty-

five, at the city and county of San Francisco, State and district of California, * * * did knowingly, wilfully, and unlawfully falsely make a certificate * * * wherein and whereby he, the said M. F. Reilly, defendant herein, did then and there falsely certify in substance and to the effect that the said Charles Holcomb, then and there being a United States deputy surveyor as aforesaid, on the date last aforesaid, appeared before him, the said M. F. Reilly, defendant herein, as commissioner aforesaid, and subscribed and swore to the affidavit and final oath to the field-notes of said pretended survey, * * * by which said affidavit and final oath and the false certificate thereto, made as aforesaid, by the said M. F. Reilly, he, the said Charles Holcomb, is made and represented to have sworn in substance and to the effect," &c.—

Setting out the affidavit to which it is alleged defendant Reilly certified that Holcomb had subscribed and sworn.

The indictment then alleges that—

"Whereas, in truth and in fact, the said Charles Holcomb did not then and there appear before him, the said M. F. Reilly, as commissioner aforesaid, or otherwise or at all, and subscribe and swear, in substance and to the effect," &c.—

Setting out the affidavit which the indictment alleges Holcomb did not subscribe and swear to.

A comparison of the two affidavits, to wit, the affidavit which it is alleged in the indictment that defendant Reilly certified that Holcomb had subscribed and sworn to, with the affidavit which the indictment alleges that Holcomb did not subscribe and swear to, will show the two affidavits are substantially different. The allegation in the indictment that Holcomb did not subscribe and swear to the last mentioned affidavit is not an allegation that he did not swear and subscribe to the affidavit to which defendant Reilly's certificate was attached. There is no de-

nial whatever of the fact stated in the certificate made by the defendant Reilly to the first affidavit set out in the indictment. The only denial is that he subscribed and swore to the latter. The affidavit to which it is alleged Reilly's certificate was attached is as follows:

"That he (Holcomb) had well, faithfully, and truly, in his own proper person, and in strict conformity with the instructions furnished by the United States Surveyor-General for California, the surveying manual, and the laws of the United States, surveyed all those parts or portions of the retracing of the boundary-line between California and Nevada, from closing cor. (meaning corner) to Tps. (meaning townships) 29 and 30 N. (meaning north), Rs. (meaning ranges) 2 E. (meaning east), S. (meaning San) B. (meaning Bernardino) M. (meaning meridian) *to closing cor.* (*meaning corner*) *to Tps.* (*meaning townships*) 11 *S.* (*meaning south*), *Rs.* (*meaning ranges*) 43 *and* 44 *E.* (*meaning east*), *Mt.* (*meaning Mount*) *D.* (*meaning Diablo*) *M.* (*meaning meridian*). The subdivision lines of Tps. (meaning townships) 11 S. (meaning south), R. (meaning range) 44 E. (meaning east), Tp. (meaning township) 12 S. (meaning south), Rs. (meaning ranges) 44 and 45 E. (meaning east), Tp. (meaning township) 13 S. (meaning south), Rs. (meaning ranges) 44, 45, and 46 E. (meaning east), and Tps. (meaning townships) 14 and 15 S. (meaning south), Rs. (meaning ranges) 44 and 45 E. (meaning east), and Tp. (meaning township) 16 S. (meaning south), R. (meaning range) 45 E. (meaning east), M. (meaning Mount) D. (meaning Diablo) M. (meaning meridian.) Also, Tp. (meaning township) 30 N. (meaning north), Rs. (meaning ranges) 1 and 2 E. (meaning east), and Tp. (meaning township) 31 N. (meaning north), R. (meaning range) 1 E. (meaning east) of the San Bernardino base and meridian, in the State of California, as represented in the foregoing field-notes, * * * and that all the corners of said survey had been established and perpetuated by him (Holcomb) in strict accordance with the surveying manual, printed instructions, the special written instruc-

tions of the surveyor-general for California, and in the specific manner described in the field-notes, * * * and that said field-notes are the true field-notes of such survey," &c.

The italicized portion of the foregoing affidavit is not contained in the affidavit which the indictment alleges Holcomb did not swear to, but is included, as before stated, in the affidavit to which Reilly certified.

The affidavit with the portion in italics is a very different document from the affidavit without such portion. The material calls of the survey are included in the former, while in the latter these essential provisions are omitted, to wit, the resurvey of the boundary line between California and Nevada. Holcomb certainly would not have sworn to an affidavit with the portion in italics excluded, and the fact that he did not has no tendency to show that he did not subscribe and swear to a proper affidavit which was certified to by defendant Reilly. This fatal defect not only answers the third question submitted by the judges, but shows that no offense whatever is charged in the indictment, and sufficiently disposes of all of the ten questions certified from the court below.

WM. M. STEWART,
For Defendant.

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES.

v.

JOHN D. HALL.

No. 1034.

ADDITIONAL BRIEF FOR DEFENDANT.

On Certificate of Division in Opinion between the Judges of the Circuit Court for the District of California.

Most of the points in this case have already been considered in the foregoing brief in No. 1036, and also in the briefs of Messrs. Hurd and Smith, but we beg leave to make the following suggestions:

The charge in this indictment is that defendant Hall "did knowingly, wilfully, and unlawfully falsely make an affidavit for the purpose of defrauding the United States of a large sum of money." The offense described in the indictment is forgery, but the indictment does not charge the defendant with forgery. It simply describes that offense, and proceeds to state how the offense was committed.

It alleges that the forgery was committed by making a genuine affidavit, and then sets out a contract between Surveyor-General Brown and the defendant to survey certain public lands, and then alleges that defendant Hall made an affidavit that he had completed the survey, and avers that the affidavit was made to defraud the United States, and was false because "in truth and in fact the field-notes accompanying and to accompany said affidavit and final oath were not true and correct field-notes of said survey, and whereas in truth and in fact he, the said John Derris Hall, had not marked, established, and perpetuated *all* of the corners of said survey in *strict* accordance with the surveying manual and the surveying instructions, and in the *specific* manner described in said field-notes."

This is no allegation that the affidavit was false or fraudulent, or that the survey and field-notes were not in substantial accordance with the contract, the surveying manual, and instructions. It is probable that no contract of any kind was ever performed with the strictness described in the foregoing quotation. The fact that the grand jury was unable to charge the defendant Hall with any substantial failure to comply with his contract shows that no offense has been committed. It certainly shows that no attempt was made to defraud the Government. The Government is not defrauded or injured in any way unless a contractor fails in some material matter to comply with his contract. Strict compliance is generally an impossibility. Only a substantial compliance is required by law.

There is no allegation that there was not a substantial compliance with all the terms and conditions of Hall's contract, or that the claim was unjust and ought not to be paid.

WM. M. STEWART,
For Defendant.

1 United States of America. United States circuit court, ninth circuit, district of California.

Indictment.

At a stated term of the said circuit court, begun and holden at the city and county of San Francisco, within and for the district of California, on the second Monday in July, in the year of our Lord one thousand eight hundred and eighty-seven.

The grand jurors of the United States of America of said circuit court, within and for the district aforesaid, on their oath aforesaid, present that George H. Perrin, John McNee, and John H. Benson, late of the district of California, heretofore, to-wit: On the second day of December, in the year of our Lord one thousand eight hundred and eighty-four, at the city and county of San Francisco, State and district of California, and within the jurisdiction of this honorable court, did unlawfully, corruptly, and wickedly conspire, combine, and agree together, and with divers other persons, to the said grand jurors unknown, to defraud the United States of a large sum of money, to-wit: The sum of four hundred and ninety-two dollars, lawful money of the United States, by the means and in the manner following, that is to say, that they, the said

2 George H. Perrin, John McNee, and John H. Benson in pursuance of the unlawful conspiracy, confederation, and agreement aforesaid, had made an' entered into for the purpose of defrauding the United States as aforesaid, did then and there procure, secure, and cause to be entered into a contract by and between the said defendant George H. Perrin, then and there being a deputy United States surveyor in and for the State of California, on the one part, and W. H. Brown, then and there being the United States surveyor-general in and for the State of California, on the other part, whereby the said defendant George H. Perrin, in his said capacity aforesaid, in substance and effect undertook, agreed, and promised for and in consideration of the sum of nine dollars per mile for base, standard, meridian, and meander lines; seven dollars per mile for township lines; and five dollars for section lines, except where the lines of survey pass over mountainous lands, or lands heavily timbered or covered with dense undergrowth, and in such case at the rate of eighteen dollars per mile for base, standard, meridian, and meander lines; sixteen dollars per mile for township lines, and fourteen dollars per mile for section lines, for every mile and part of a mile actually run and marked in the field, random lines and offsets not included; to well, truly, and faithfully in his own proper person, in strict conformity with the laws of the United States, the printed manual of surveying instruction, and other surveying instructions issued by the Commissioner of the General Land Office

3 and with such special instructions as he may receive from the surveyor-general in conformity therewith, survey, mark and establish the subdivision lines and the east boundary of Tp. (meaning township) 13 N. (meaning north), R. (meaning range) 11 W. (meaning west), M. (meaning Mount), D. (meaning Diablo) M. (meaning meridian), and also the subdivision lines and the north, east, and west boundaries of Tp. (meaning township) 11 N. (meaning north), R. (meaning range) 12 W.

(meaning west), M. (meaning Mount) D. (meaning Diablo) M. (meaning meridian), and which said lands are more definitely described as follows, to-wit: The east boundary of township thirteen north, range eleven west, Mount Diablo meridian, and, also, the subdivision lines and the north, east, and west boundaries of township eleven north, range twelve west, Mount Diablo meridian, which said lands were public lands of the United States, and were and are situate within the district and State of California, and that he would complete the surveys in the manner aforesaid, and return the true field-notes thereof to the office of the said surveyor-general on or before the 30th of June, 1885. (Sec. 5440, R. S. U. S.)

And it was further expressly stipulated, understood, and agreed, by and between the said George H. Perrin, defendant and United States deputy surveyor, and the said W. H. Brown, United States surveyor-general aforesaid, and made a condition of the aforesaid contract that the surveys in said contract described should not be commenced before the said
4 George H. Perrin, defendant herein, should be officially notified by the said surveyor-general of the approval of the aforesaid contract by the Commissioner of the General Land Office.

And it was further stipulated, understood, and agreed by and between the said George H. Perrin, United States deputy surveyor as aforesaid, defendant herein, and the said W. H. Brown, United States surveyor-general aforesaid, and made a condition of the aforesaid contract, that no accounts should be paid for the surveys in said contract stipulated to be made, unless properly certified by the said W. H. Brown in his official capacity aforesaid, and by his successor in office in such official capacity, should the said W. H. Brown for any cause cease to be such officer aforesaid; that such surveys were in accordance with the instructions in said contract stipulated to be observed by him, the said George H. Perrin, and until approved plats and certified transcripts of the field-notes of the surveys to be made by him, the said George H. Perrin, and for which accounts should be rendered, were filed in the General Land Office.

And it was further stipulated, understood, and agreed by and between the said George H. Perrin, United States deputy surveyor as aforesaid, defendant herein, and the said W. H. Brown, United States surveyor-general as aforesaid, and made a condition of the aforesaid contract that no payment should be made for the surveys stipulated to be made by him, the said George H. Perrin, not executed by the said deputy surveyor in his own proper person, which said contract was duly approved by
5 the Commissioner of the General Land Office on December 13th, 1884, of which said approval the said George H. Perrin was thereafter officially notified by the United States surveyor-general of the State of California.

And that in pursuance of the aforesaid conspiracy, combination, confederacy, and agreement amongst them, the said defendants made and entered into as aforesaid, to defraud the United States, as aforesaid, the said George H. Perrin, well knowing that the aforesaid contract had been made and entered into by and between him, the said George H. Perrin, United States deputy surveyor as aforesaid, and the said W. H. Brown, United States surveyor-general as aforesaid, at the time and in the manner aforesaid, for a survey of the lands in the aforesaid contract, and hereinbefore described, and full well knowing the terms and conditions of the

said contract thereafter (meaning after the second day of December, 1884), and before the date next hereinafter mentioned, for the purpose and with the intent to effect the object of the aforesaid conspiracy, did cause and procure a fraudulent, fictitious, and pretended survey of the lands described in the aforesaid contract, and hereinbefore described, to be made.

And he, the said George H. Perrin, defendant herein, then and there well knowing said survey of the aforesaid lands, so caused and procured by him, the said George H. Perrin, to be made as aforesaid, had not been made in strict conformity with the laws of the United States, the printed manual of surveying instructions, and other instructions issued by the Commissioner of the General Land Office; and he, the said George
6 H. Perrin, defendant herein, well knowing that he, the said George H. Perrin, United States deputy surveyor aforesaid, and defendant herein, had not executed the said survey of the lands in the aforesaid contract, and hereinbefore described, in his own proper person, or at all; and he, the said George H. Perrin, defendant herein, well knowing that said survey of the lands hereinbefore described, so caused and procured by him, the said defendant, George H. Perrin, to be made as aforesaid, was fraudulent, fictitious, and pretended, for the purpose and with the intent of imposing upon and deceiving W. H. Brown, United States surveyor-general aforesaid, in his official capacity aforesaid, and his (meaning the said W. H. Brown) successor in office in such official capacity aforesaid, should the said W. H. Brown, for any cause cease to be such officer aforesaid, and for the purpose and with the intent of securing the approval of said pretended survey by the said W. H. Brown, in his official capacity as United States surveyor-general, as aforesaid, and by his (meaning the said W. H. Brown) successor in office in such official capacity, should the said W. H. Brown for any cause cease to be such officer aforesaid, and for the further purpose of procuring the said W. H. Brown, in his official capacity as United States surveyor-general aforesaid, should the said W. H. Brown for any cause cease to be such officer aforesaid, to properly certify to the accounts and amounts accruing to the defendant under and by the terms of the aforesaid contract, and for the further purpose of securing approved plats and certified transcripts of the field-notes of said pretended survey to be filed in the General Land Office, and with the intent
7 and for the purpose of securing the payment from the United States of the contract price for said survey agreed to be paid under and by the terms of said contract made and entered into as aforesaid, by and between the said George H. Perrin, United States deputy-surveyor, and the said W. H. Brown, United States surveyor-general aforesaid, and with the intent to corruptly, wickedly, and unlawfully defraud the United States out of a large sum of money, to wit, the sum of four hundred and ninety-two dollars, the said George H. Perrin, defendant herein, heretofore, to wit, on the 20th day of April, in the year of our Lord one thousand eight hundred and eighty-five, at the city and county of San Francisco, State and district of California, and within the jurisdiction of this honorable court, did cause and procure false, fictitious, and fraudulent field-notes of the aforesaid false, fictitious, and pretended survey to be made and returned to the United States surveyor-general aforesaid of the following lands in the aforesaid contract and hereinbefore described, to wit: Tp. (meaning township) 11 N. (meaning north), R.

(meaning range) 12 W. (meaning west), and Tp. (meaning township) 13 N. (meaning north), R. (meaning range) 11 W. (meaning west), of the M't (meaning Mount) Diablo base and meridian in the State of California, which said lands are more definitely described as follows, to wit: township eleven north, range twelve west, and township thirteen north, range eleven west of the Mount Diablo base and meridian, and which said lands were public lands of the United States, and were and are
8 situate within the district and State of California, which said false, fictitious, and fraudulent field-notes represented that the aforesaid survey had been made by the said defendant George H. Perrin, United States deputy-surveyor, in his own proper person, whereas in truth and in fact the aforesaid survey had not been made by the said George H. Perrin, United States deputy-surveyor, or otherwise, in his own proper person, or at all, and which said false, fictitious, and fraudulent field-notes purported to be true field-notes of the actual work as done in the field in making the aforesaid survey of the lines of the lands in the aforesaid contract, and hereinbefore described, whereas in truth and in fact said field-notes were not true field-notes of the work actually done in the field, and which said false, fictitious, and fraudulent field-notes represented that the aforesaid pretended survey of the lands last hereinbefore described had been made in strict conformity with the laws of the United States, and the printed manual of surveying instructions, whereas in truth and in fact the aforesaid survey had not been made in strict conformity with the laws of the United States and the printed manual of surveying instructions, or in conformity therewith at all, and which said false, fictitious, and fraudulent field-notes represented that all the corners of the aforesaid survey of the lands last hereinbefore described had been established and perpetuated in strict accordance with the surveying manual of printed instructions, and in the specific manner therein described, whereas in
9 truth and in fact all the corners of the aforesaid survey of the lands last hereinbefore described had not been established and perpetuated in strict accordance with the surveying manual of printed instructions and in the specific manner in the aforesaid field-notes described; and which said false, fictitious, and fraudulent field-notes represented and purported to be the true field-notes of the aforesaid pretended survey of the lands last hereinbefore described, whereas in truth and in fact they were not true field-notes of the said survey, but on the contrary were false, fictitious, and fraudulent field-notes of said survey, all of which the said defendants, George H. Perrin, John McNee, and John A. Benson, then and there well knew.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said defendants, George H. Perrin, John McNee, and John H. Benson, on the second day of December, in the year of our Lord one thousand eight hundred and eighty-four, at the city and county of San Francisco, State and district of California, and within the jurisdiction of this honorable court, did knowingly, unlawfully, corruptly, and wickedly conspire, confederate, combine, and agree together to defraud the United States of a large sum of money, to wit, the sum of four hundred and ninety-two dollars, and the unlawful and fraudulent acts in manner and form, and by the defendants in this count hereinbefore set forth, were done to effect the object thereof.

Against the peace and dignity of the United States of America, contrary

to the form of the statutes of the United States of America in such case made and provided.

10 Count two.

And the grand jurors aforesaid, on their oath aforesaid, do further present that George H. Perrin, John McNee, and John A. Benson, late of the district of California, heretofore, to wit, on the second day of December, in the year of our Lord one thousand eight hundred and eighty-four, at the city and county of San Francisco, State and district of California, and within the jurisdiction of this honorable court, did knowingly, unlawfully, corruptly, and wickedly conspire, combine, confederate, and agree together, and with divers other persons to the said grand jurors unknown, to defraud the United States of a large sum of money, to wit, the sum of four hundred and ninety-two dollars, lawful money of the United States, by the means and in the manner following; that is to say, that they, the said George H. Perrin, John McNee, and John A. Benson, in pursuance of the unlawful conspiracy, confederation, and agreement aforesaid, had, made, and entered into for the purpose of defrauding the United States as aforesaid, did then and there procure, secure, and cause to be entered into a contract by and between the said defendant George H. Perrin, then and there being a deputy United States surveyor in and for the State of California, on the one part, and W. H. Brown, then and there being the United States surveyor-general in and for the State of California, on the other part, whereby the said defendant George H. Perrin, in his said
11 capacity aforesaid, in substance and effect undertook, agreed, and promised, for and in consideration of the sum of nine dollars per mile for base, standard, meridian, and meander lines; seven dollars per mile for township lines, and five dollars for section lines, except where the lines of survey pass over mountainous lands, or lands heavily timbered or covered with dense undergrowth, and in such case at the rate of eighteen dollars per mile for base, standard, meridian, and meander lines; sixteen dollars per mile for township lines, and fourteen dollars per mile for section lines, for every mile and part of a mile actually run and marked in the field, random lines and offsets not included, to well, truly, and faithfully in his own proper person, in strict conformity with the laws of the United States, the printed manual of surveying instruction, and other surveying instructions issued by the Commissioner of the General Land Office, and with such special instructions as he may receive from the surveyor-general in conformity therewith, survey, mark, and establish the subdivision lines and the east boundary of Tp. (meaning township) 13 N. (meaning north), R. (meaning range) 11 W. (meaning west), M. (meaning Mount) D. (meaning Diablo) M. (meaning meridian), and also the subdivision lines and the northeast and west boundaries of Tp. (meaning township) 11 N. (meaning north), R. (meaning range) 12 W. (meaning west), M. (meaning Mount), D. (meaning Diablo) M. (meaning meridian), and which said lands are more definitely described as follows, to wit,
12 the east boundary of township thirteen north, range eleven west, Mount Diablo meridian, and also the subdivision lines and the northeast and west boundaries of township eleven north, range twelve west, Mount Diablo meridian, which said lands were public lands of the

United States, and were and are situate within the district and State of California, and that he would complete the surveys in the manner aforesaid, and return the true field-notes thereof to the office of the said surveyor-general on or before the 30th of June, 1885. (Sec. 5440, R. S., U. S.)

And it was further expressly stipulated, understood, and agreed by and between the said George H. Perrin, defendant, and United States deputy-surveyor as aforesaid, and the said W. H. Brown, United States surveyor-general, and made a condition of the aforesaid contract, that the surveys in said contract described should not be commenced before the said George H. Perrin, defendant herein, should be officially notified by the surveyor-general of the approval of the aforesaid contract by the Commissioner of the General Land Office.

And it was further stipulated, understood, and agreed by and between the said George H. Perrin, United States deputy-surveyor as aforesaid, defendant herein, and the said W. H. Brown, United States surveyor-general aforesaid, and made a condition of the aforesaid contract, that no accounts should be paid for the surveys in said contract stipulated
13 to be made unless properly certified by the said W. H. Brown in his official capacity aforesaid, and by his successor in office in such official capacity, should the said W. H. Brown for any cause cease to be such officer aforesaid, that such surveys were in accordance with the instructions in said contract stipulated to be observed by him, the said George H. Perrin, and until approved plats and certified transcripts of the field-notes of the surveys to be made by him, the said George H. Perrin, and for which accounts should be rendered, were filed in the General Land Office.

And it was further stipulated, understood, and agreed, by and between the said George H. Perrin, United States deputy surveyor as aforesaid, defendant herein, and the said W. H. Brown, United States surveyor-general as aforesaid, and made a condition of the aforesaid contract that no payment should be made for the surveys stipulated to be made by him, the said George H. Perrin, not executed by the said deputy surveyor, in his own proper person, which said contract was duly approved by the Commissioner of the General Land Office on December 13th, 1884, of which said approval the said George H. Perrin was thereafter officially notified by the United States surveyor-general of the State of California.

And that in pursuance of the aforesaid conspiracy, combination, confederacy, and agreement amongst them, the said defendants, made and entered into as aforesaid, to defraud the United States as aforesaid, the said
14 defendant, George H. Perrin, for the purpose and with the intent to effect the object of the aforesaid conspiracy, falsely and fraudulently pretending that he had made a survey of the lands in the aforesaid contract, and hereinbefore described, in strict conformity with the laws of the United States, the printed manual of surveying instructions, and other instructions issued by the Commissioner of the General Land Office, and in his own proper person, as required by the terms of the aforesaid contract; whereas in truth and in fact he, the said George H. Perrin, had not made a survey of the lands in said contract, and hereinbefore described, in strict conformity with the laws of the United States, the printed manual of surveying instructions, and other instructions issued by the Commissioner of the General Land Office; and whereas in truth and in fact he,

the said George H. Perrin, had not made a survey of the lands in the aforesaid contract, and hereinbefore described, in his own proper person, or at all; for the purpose of imposing upon and deceiving the said W. H. Brown, United States surveyor-general as aforesaid, in his official capacity as aforesaid, and his (meaning the said W. H. Brown) successor in office in such official capacity aforesaid, should the said W. H. Brown for any cause cease to be such officer aforesaid, and for the purpose and with the intent of securing the approval of said pretended survey by the said W. H. Brown, in his official capacity as United States surveyor-general
15 aforesaid, and by his (meaning the said W. H. Brown) successor in office in such official capacity, should the said W. H. Brown for any cause cease to be such officer aforesaid, and for the further purpose of procuring the said W. H. Brown, in his official capacity as United States surveyor-general aforesaid, and his (meaning the said W. H. Brown) successor in office in such official capacity as aforesaid, should the said W. H. Brown for any cause cease to be such officer aforesaid, being thereto authorized and empowered by law so to do, to properly certify to the accounts and amounts accruing to the said George H. Perrin, defendant herein, under and by the terms of the aforesaid contract, and for the further purpose of securing approved plats and certified transcripts of the field-notes of said pretended survey to be filed in the General Land Office, and with the intent and for the purpose of securing the payment to him, the said George H. Perrin, from the United States, of the contract price agreed to be paid for said survey, according to the terms of the aforesaid contract, and with the intent to corruptly, wickedly, and unlawfully defraud the United States out of a large sum of money, to wit, the sum of four hundred and ninety-two dollars, the said George H. Perrin, defendant herein, heretofore, to wit, on the 20th of April, in the year of our Lord one thousand eight hundred and eighty-five, at the city and county of San Francisco, State and district of California, and within the jurisdiction of this honorable court, did make, and cause to be made, false, ficti-
16 tious, and fraudulent field-notes of the aforesaid false, fraudulent, and pretended survey of the following lands in the aforesaid contract, and hereinbefore described, to wit: Tp. (meaning township) 11 N. (meaning north), R. (meaning range) 12 W. (meaning west); and Tp. (meaning township) 13 N. (meaning north), R. (meaning range) 11 W. (meaning west), of the M't (meaning mount) Diablo base and meridian in the State of California, and which said lands are more definitely described as follows, to wit: Township eleven north, range twelve west, and township thirteen north, range eleven west, of the Mount Diablo base and meridian, situate within the district and State of California, which said false, fictitious, and fraudulent field-notes represented that the aforesaid survey had been made by him, the said defendant, George H. Perrin, United States deputy surveyor as aforesaid, in his own proper person, whereas in truth and in fact the aforesaid pretended survey had not been made by the said George H. Perrin as United States deputy surveyor, or otherwise, in his own proper person, or at all, and which said false, fictitious, and fraudulent field-notes, so made and caused to be made by him, the said George H. Perrin as aforesaid, purported to be true field-notes of the actual work as done in the field in making the aforesaid survey of the subdivision and boundary lines of the lands last hereinbefore described,

whereas in truth and in fact said field-notes were not true field-notes of the work actually done in the field in said survey, and which said
17 false, fictitious, and fraudulent field-notes represented that the aforesaid pretended survey of the lands last hereinbefore described had been made in strict conformity with the laws of the United States and the printed manual of surveying instructions, whereas in truth and in fact the aforesaid survey had not been made in strict conformity with the laws of the United States and the printed manual of surveying instructions, or in conformity therewith at all, and which said false, fictitious, and fraudulent field-notes represented that all the corners of the aforesaid survey of the lands last hereinbefore described had been established and perpetuated in strict accordance with the surveying manual, printed instructions, and in the specific manner in said field-notes described, whereas in truth and in fact all the corners of the aforesaid survey of the lands last hereinbefore described had not been established and perpetuated in strict accordance with the surveying manual of printed instructions, and in the specific manner in the aforesaid field-notes described, all of which he, the said George H. Perrin, then and there well knew, and all of which said defendants, George H. Perrin, John McNee, and John A. Benson, well knew.

And that the said W. H. Brown, United States surveyor-general aforesaid, by the said wicked, unlawful, and corrupt conspiracy, confederacy, and agreement, made and entered into by the defendants, George H. Perrin, John McNee, and John A. Benson, as aforesaid, and the
18 said false, wicked, unlawful, and fraudulent acts done in pursuance thereof, as hereinbefore in this count set forth, was deceived into approving the said pretended survey and the said false, fictitious, and fraudlent field-notes, and into stating and certifying the amount accrued to and earned by the said George H. Perrin, defendant herein, under and by the terms of the aforesaid contract.

And so the jurors aforesaid, upon their oath aforesaid, do say: That the said defendants on the second day of December, in the year of our Lord one thousand eight hundred and eighty-four, at the city and county of San Francisco, State and district of California, and within the jurisdiction of this honorable court, did knowingly, unlawfully, corruptly, and wickedly conspire, confederate, and combine, and agree together to defraud the United States of a large sum of money, to wit, the sum of four hundred and ninety-two dollars, and the unlawful and fraudulent acts in manner and form, and by the defendants in this count hereinbefore set forth, were done to effect the object thereof.

Against the peace and the dignity of the United States of America contrary to the form of the statutes of the said United States of America in such case made and provided.

19 COUNT THREE.

And the grand jurors aforesaid, on their oath aforesaid, do further present that George H. Perrin, John McNee, and John A. Benson, late of the district of California, heretofore, to wit, on the 2nd day of December, in the year of our Lord one thousand eight hundred and eighty-four, at the city and county of San Francisco, State and district of California, and within the jurisdiction of this honorable court, did

knowingly, unlawfully, corruptly, and wickedly conspire, combine, confederate, and agree, together and with divers other persons to the said grand jurors unknown, to defraud the United States of a large sum of money, to wit, the sum of four hundred and ninety-two dollars lawful money of the United States, by the means and in the manner following, that is to say, that they, the said George H. Perrin, John McNee, and John A. Benson, in pursuance of the unlawful conspiracy, confederation, and agreement aforesaid, had, made, and entered into for the purpose of defrauding the United States as aforesaid, did then and there procure, secure, and cause to be entered into a contract by and between the said defendant, George H. Perrin, then and there being a deputy United States surveyor in and for the State of California, on the one part, and W. H. Brown, then and there being the United States surveyor-general in and
20 for the State of California, on the other part, whereby the said defendant, George H. Perrin, in his said capacity aforesaid, in substance and effect undertook, agreed, and promised, for and in consideration of the sum of nine dollars per mile for base, standard, meridan, and meander lines, seven dollars for township lines, and five dollars for section lines, except where the lines of survey pass over mountainous lands, or lands heavily timbered or covered with dense undergrowth, and in such case at the rate of eighteen dollars per mile for base, standard, meridian, and meander lines, sixteen dollars per mile for township lines, and fourteen dollars per mile for section lines, for every mile and part of a mile actually run and marked in the field, random lines and offsets not included; to well, truly, and faithfully, in his own proper person, in strict conformity with the laws of the United States, the printed manual of surveying instruction, and other surveying instructions issued by the Commissioner of the General Land Office, and with such special instructions as he may receive from the surveyor-general in conformity therewith, survey, mark, and establish the subdivision lines and the east boundary of Tp. (meaning township) 13 N. (meaning north), R. (meaning range) 11 W. (meaning west), M. (meaning mount) D. (meaning Diablo) M. (meaning meridian); and also the subdivision lines and the north, east, and west boundaries of Tp. (meaning township) 11 N. (meaning north) R. (meaning range) 12 W. (meaning west) M. (meaning mount) D. (meaning Diablo) M. (meaning meridian); and which said lands are
21 more definitely described as follows, to wit: The east boundary of township thirteen north, range eleven west, Mount Diablo meridian, and also the subdivision lines and the north, east, and west boundaries of township eleven north, range twelve west, Mount Diablo meridian, and which said lands were public lands of the United States, and were and are situate within the district and State of California, and that he would complete the surveys in the manner aforesaid, and return the true field-notes thereof to the office of the said surveyor-general on or before the 30th of June, 1885. (Sec. 5440, R. S., U. S.)

And it was further expressly stipulated, understood, and agreed, by and between the said George H. Perrin, defendant, and United States deputy surveyor as aforesaid, and the said W. H. Brown, United States surveyor-general, and made a condition of the aforesaid contract, that the surveys in said contract described should not be commenced before the said George H. Perrin, defendant herein, should be officially notified by the surveyor-

general of the approval of the aforesaid contract by the Commissioner of the General Land Office.

And it was further stipulated, understood, and agreed, by and between the said George H. Perrin, United States deputy surveyor, as aforesaid, defendant herein, and the said W. H. Brown, United States surveyor-general aforesaid, and made a condition of the aforesaid contract, that no accounts should be paid for the surveys in said contract stipu-
22 lated to be made, unless properly certified by the said W. H. Brown in his official capacity aforesaid, and by his suc'essor in office in such official capacity should the said W. H. Brown for any cause cease to be such officer aforesaid; that such surveys were in accordance with the instructions in said contract stipulated to be observed by him, the said George H. Perrin, and until approved plats and certified transcripts of the field-notes of the surveys to be made by him, the said George H. Perrin, and for which accounts should be rendered, were filed in the General Land Office.

And it was further stipulated, understood, and agreed, by and between the said George H. Perrin, United States deputy surveyor as aforesaid, defendant herein, and the said W. H. Brown, United States surveyor-general as aforesaid, and made a condition of the aforesaid contract, that no payment should be made for the surveys stipulated to be made by him, the said George H. Perrin, not executed by the said deputy surveyor in his own proper person, which said contract was duly approved by the Commissioner of the General Land Office, on December 13th, 1884, of which said approval the said George H. Perrin was thereafter officially notified by the United States surveyor-general of the State of California.

And that in pursuance of the aforesaid conspiracy, combination, confederacy, and agreement amongst them, the said defendants, made and entered into as aforesaid, to defraud the United States as aforesaid,
23 the said defendant, George H. Perrin, for the purpose and with the intent to effect the object of the aforesaid conspiracy, falsely and fraudulently pretending that he had made a survey of the lands in the aforesaid contract and hereinbefore described, in strict conformity with the laws of the United States, the printed manual of surveying instructions, and other instructions issued by the Commissioner of the General Land Office, and in his own proper person, as required by the terms of the aforesaid contract, for the purpose of imposing upon and deceiving the said W. H. Brown, the United States surveyor-general aforesaid, in his official capacity aforesaid, and his (meaning the said W. H. Brown) successor in office in such official capacity aforesaid, should the said W. H. Brown for any cause cease to be such officer aforesaid, and for the purpose of securing the approval of said pretended survey by the said W. H. Brown in his official capacity as United States surveyor-general as aforesaid, and by his (meaning the said W. H. Brown) successor in office in such official capacity, should the said W. H. Brown for any cause cease to be such officer aforesaid, thereto being duly authorized and empowered by law so to do, and for the further purpose of procuring the said W. H. Brown, in his official capacity as United States surveyor-general, as aforesaid, or his (meaning the said W. H. Brown) sucessor in office in such official capacity as aforesaid, should the said W. H. Brown for any cause cease to be such officer aforesaid, being thereto authorized and

24 empowered by law so to do, to properly certify to the accounts and amounts accruing to the said George H. Perrin, defendant herein, under and by the terms of the aforesaid contract, and for the further purpose of securing the transmittal of his said accounts to the proper officer of the Department of the Interior for approval and allowance, and for the purpose of securing approved plats and certified transcripts of the field-notes of said pretended survey to be filed in the General Land Office, with the intent and for the purpose of securing the payment to him, the said George H. Perrin, from the United States of the contract price agreed to be paid for said survey according to the terms of the aforesaid contract, and with the intent to corruptly, wickedly, and unlawfully defraud the United States out of a large sum of money, to wit, the sum of four hundred and ninety-two dollars, the said George H, Perrin, defendant herein, heretofore, to wit, on the 20th day of April, in the year of our Lord one thousand eight hundred and eighty-five, at the city and county of San Francisco, State and district of California, and within the jurisdiction of this honorable court, did make, and cause to be made, false, fictitious, and fraudulent field-notes of the aforesaid false, fraudulent, and pretended survey of the lands in the aforesaid contract, and hereinbefore described, to wit: Tp. (meaning township) 11 N. (meaning north), R. (meaning range) 12 W. (meaning west), and Tp. (meaning township) 13 N. (meaning north), R. (meaning range) 11 W. (meaning west), of the M't (meaning Mount) Diablo
25 base and meridian in the State of California, which said lands are more definitely described as follows, to wit:

Township 11 north, of range 12 west, and township 13 north, of range 11 west, Mount Diablo base and meridian, and situate within the district and State of California.

And the said George H. Perrin, to effect the object of the said unlawful, corrupt, and wicked conspiracy, agreement, and combination as aforesaid did, on the 2nd day of December, in the year of our Lord one thousand eight hundred and eighty-four, at the city and county of San Francisco, State and district of California, and within the jurisdiction of this honorable court, as United States deputy surveyor aforesaid, make final oath to the aforesaid false, fictitious, and fraudulent field-notes, and did then and there make, sign, and execute a certain false and corrupt oath, affidavit, and certificate, wherein he, the said George H. Perrin, then and there knowingly, wilfully, falsely, corruptly, and fraudulently did depose, declare, and certify on his oath aforesaid, in substance and effect, he, the said George H. Perrin, then and there being first duly sworn in that behalf by Lee D. Craig, a notary public duly appointed, commissioned, and qualified as such in and for the city and county of San Francisco, State of California, then and there being an officer and person competent to administer said oath to the said George H. Perrin, and such oath being then and there taken as aforesaid, in a case by a law of the United States authorized to be administered and taken, that he had in his own
26 proper person made an actual survey of Tp. (meaning township) 11 N. (meaning north), R. (meaning range) 12 W. (meaning west), and Tp. (meaning township) 13 N. (meaning north), R. (meaning range) 11 W. (meaning west), of the Mt. (meaning Mount) Diablo base and meridian in the State of California, and which said lands are more definitely described as follows, to wit: Township eleven north, range twelve

west, and township thirteen north, range eleven west of the Mount Diablo base and meridian, in the State of California, the same being the subdivision and boundary-lines of the lands in the contract aforesaid and hereinbefore described, and that the field-notes accompanying and to accompany the said false, willful, and corrupt oath, affidavit, and certificate were true and correct field-notes of such survey, and that he had marked all the corners of said survey, and had established and perpetuated the same in strict accordance with the surveying manual and the surveying instructions, and in the specific manner described in said field-notes, whereas, in truth and in fact, the said George H. Perrin had not, in his own proper person, made an actual survey of the subdivision and boundary-lines of the lands last hereinbefore described, or at all; and whereas, in truth and in fact, the field-notes accompanying and to accompany the said oath, affidavit, and certificate were not true and correct field-notes of such survey; and whereas, in truth and in fact, he had not marked, established, and perpetuated all the corners of said survey in strict
27 accordance with the surveying manual and the surveying instructions and in the specific manner described in said field-notes, and all of which he the said George H. Perrin well knew to be corruptly and wickedly false.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said defendants, George H. Perrin, John McNee, and John A. Benson, on the second day of December, in the year of our Lord one thousand eight hundred and eighty-four, at the city and county of San Francisco, State and district of California, and within the jurisdiction of this honorable court, did knowingly, unlawfully, corruptly, and wickedly conspire, confederate, combine, and agree together to defraud the United States of a large sum of money, to wit, the sum of four hundred and ninety-two dollars, and the unlawful and fraudulent acts in manner and form and by the defendants in this count hereinbefore set forth were done to effect the object thereof, against the peace and dignity of the United States of America and contrary to the form of the statutes of the said United States of America in such case made and provided.

JOHN T. CAREY,
U. S. Attorney.

28 Names of witnesses examined before the said grand jury on finding the foregoing indictment: John C. Ruddock, Harvey A. Light, James H. Murphy, M. V. Helm, Frank Van Dyke, William McKinney, C. A. Mellville, John D. Hall, Henry Meyrick, jr., C. W. Sawyer, J. W. Fitzpatrick, James H. Crossman, Mrs. Frederick K. Harrison, J. H. Wildes, James R. Maginnis, H. E. Buckley, C. F. Conrad, Frank J. Buckley, Walter K. Slack, Robert White, Joseph Davidson, J. S. O'Neal, John S. Reed, T. T. Tidball, Charles Holcomb, B. W. Childs, M. F. Reilly, George Miller, John A. Robinson, R. P. Hammond, jr., J. R. Mauran, L. D. Craig, Theodore Reichert, W. H. Brown.

Endorsed: Indictment for conspiracy to defraud the United States, etc. A true bill. A. B. Forbes, foreman.

Presented and filed in open court this 26 day of November, A. D. 1887. L. S. B. Sawyer, clerk.

29 In the United States circuit court, ninth circuit, district of California.

THE UNITED STATES
vs.
GEO. H. PERRIN ET ALS. } 2143.

Demurrer of G. H. Perrin.

Now comes the defendant G. H. Perrin, in his proper person into court, and having heard read the indictment against him in this case, he saith that said indictment and the matters and things therein contained in manner, form, and substance as the same is herein stated in each and every count of said indictment is, and the same are, insufficient in law, and that the said defendant is not bound by the law of the land to answer the same, and this he stands ready to verify.

Wherefore, for want of a sufficient indictment herein, the said defendant prays the judgment of this court that he be by the proper judgment and order of this court dismissed from said premises in said indictment specified, and that said indictment be declared illegal, invalid, and insufficient.

II.

And said defendant, for further grounds and cause of demurrer to said indictment and to all the counts thereof, says that said indictment in all the counts is insufficient in law; that is to say—

I. Because said indictment in each and all of its counts or in
30 any thereof does not charge any offense of any kind against the United States or the laws thereof, nor does it charge any act which is made a misdemeanor, or felony, or any crime by the laws of the United States, nor does it charge any offense whatever.

1½. Because said indictment attempts to charge a conspiracy to defraud the United States of a certain sum of money, but does not allege that defendants or either of them knew or had any knowledge that said amount was false or fraudulent, or that the claim for payment thereof was false or fraudulent, nor is it alleged that said claim was false or fraudulent.

2. Because said indictment attempts to charge a conspiracy to defraud the United States, but does not allege how or in what manner said offense was to be committed, nor does it allege any act or circumstance constituting said offense.

3. Because said indictment attempts to charge a conspiracy to defraud the United States, but it does not allege any overt act by said defendant or either of the defendants in said indictment for the purpose of effecting the object of said conspiracy, or any overt act which could or would effect such object.

4. Because said indictment attempts to charge a conspiracy to defraud the United States by means of an alleged contract for surveying said to have been entered into between W. H. Brown and the defendant, , which contract appears to have been entered into between and said W. H. Brown as private individuals, nor does it
31 appear that said contract was to bind the United States, or that said W. H. Brown had any authority of law or jurisdiction to bind the United States in said contract.

5. Because it is not alleged, nor does it appear in said indictment, that the defendant or any of his codefendants agreed or intended or conspired to do an unlawful act or to do a lawful act in an unlawful manner.

6. Because it appears on the face of said indictment that the act done in pursuance of said conspiracy, to wit, the procuring of a contract to survey public lands for Geo. H. Perrin, defendant, was a lawful act done in a lawful manner, nor is it averred that said defendant or any of his codefendants had any intention of committing any fraud under or by means of said contract, but it appears upon the face of said indictment that the utmost caution and care was taken by said defendants to incorporate into said contract such stringent provisions as would make it impossible to defraud the Government thereunder, and that the procuring of said contract was a lawful act, legally and properly done.

7. Because said indictment does not aver, in any of the counts thereof, that said defendant, or any one of them, committed or did any overt act for the purpose of carrying out the object of said alleged conspiracy, or any act which would or could have resulted in the defrauding of the United States.

32 3. Because said indictment alleged that one of the defendants procured a fraudulent survey of certain lands and committed other alleged illegal acts for the purpose of deceiving the surveyor-general for the State of California, and thereby securing said surveyor-general's approval of an alleged survey; but it is not averred that said surveyor-general had any authority of law or jurisdiction to approve said survey.

9. Because it is alleged that one of said defendants did certain things and performed certain acts with intent to deceive the surveyor-general of California, and secured his approval of certain accounts and amounts accruing to defendant, Geo. H. Perrin, under and by the terms of said contract for surveying; but it is not alleged that said surveyor-general had any authority of law or jurisdiction to certify to or approve said accounts and amounts, or any account or amount.

10. Because it is alleged that one of said defendants, by certain acts therein mentioned, intended to secure the approved plats, and certified transcripts of the said survey to be filed in the General Land Office with intent, etc., to secure payment for said survey; but does not aver, nor does it appear in said indictment, how or by whom said tracts were to be filed, or how, or in what manner the United States, would be led or induced to pay any amount on said contract; nor is it alleged in said indictment that defendants, or any of them, had any knowledge that the acts mentioned, or any of them, would secure the payment of a large sum,

33 or any sum of money on said contract; nor is it anywhere alleged how, or in what manner, or by what means said fraud was to have been committed, or that defendant intended to or did do these acts fraudulently.

11. Because it is averred that said defendant procured a certain contract for surveying to be made between defendant Perrin and the surveyor-general of California; but it is not averred, nor does it appear, that the United States had any interest in, or any connection with said contract or that the same was procured in an unlawful manner, or with any intent or purpose on part of defendant, or either of them, to defraud the United States.

12. Because it is alleged that by reason of certain things done by one of said defendants the U. S. surveyor-general of California was deceived into approving certain surveys and field-notes mentioned in said indictment, and deceived into stating and certifying the certain amount due under the said contract; but it is nowhere in said indictment alleged that said surveyor-general had any authority of law or jurisdiction to do or perform said acts or any of them; nor is it averred, nor in said indictment shown, how the doing of said acts would in any manner tend to defraud the United States.

13. Because it appears upon the face of said indictment that the alleged false affidavit of said alleged to have been made to effect the
34 object of said conspiracy, was made before a person having no authority, power, jurisdiction, or competency to administer said affidavit; nor is it alleged that said affidavit contained any material matter or averment; nor does it appear wherein said oath was untrue.

And further, that it appears on the face of said indictment that said affidavit was immaterial to any issue of fact, and was not authorized by any law of the United States.

14. Because it appears from the face of said indictment that the surveys agreed to be made in said contract were made according to law, and in accordance with the terms of said contract, and that said defendant, was, under the state of facts set out in said indictment, entitled to receive the sums accruing under said contract.

15. Because it does not appear in said indictment that there was any attempt made by said defendants, or any of them, to secure the approval or payment of any accounts accruing under said contracts.

16. Because it appears upon the face of said indictment that said defendant, nor any of them at any time, never attempted or intended in any way or manner to collect any sums of money on said contract except "in accordance with the terms of said contract."

17. Because it appears from the face of said indictment that it was impossible to collect any sums on said alleged contracts, because the surveys and field-notes were not certified by the final oath of the surveyor, as required by law and the terms of said contract.

35 18. Because it appears from the face of the said indictment that no sums of money could, under any circumstances, be obtained from the United States on said alleged contract, because the said surveys and the field-notes thereof had not been verified by the final oath required by law and the terms of said contract.

19. Because it appears from the face of said indictment that the alleged overt act committed by said defendant, G. H. Perrin, was of no effect, because the affidavit alleged to have been made by him was made before an officer incompetent to administer said oath and having no authority so to do, nor was said oath authorized or required by law; nor is it alleged to be material to any issue; nor is it stated wherein the same is false.

20. Because said indictment and all the counts thereof are uncertain, unintelligible, and ambiguous in this: that defendant is not informed of what the alleged offense consists, and when the acts constituting said alleged offense or the alleged overt acts were committed, or how or in what manner the said alleged acts would defraud the United States.

21. Because it appears from the face of the said indictment that the

amount therein had been earned and had accrued to and was due to Geo. H. Perrin, the deputy surveyor, with whom said alleged contract was made, and that the sums in said indictment were legally due to said Perrin, the deputy surveyor, with whom said contract was made, and payable
36 to him from the United States, and that the said contract had been faithfully performed by said Perrin, and that defendant and his co-defendants in said indictment conspired to obtain said money in fraud of said Perrin, which is not an offense against the United States.

22. Because it is not alleged in said indictment when said contract, under which said money was to be obtained, was made, or that all the moneys due thereon had not been collected, or that said contract by the conditions thereof was not forfeited.

23. Because it appears from the face of said alleged contract that no sums of money could be collected therein, because the terms of said contract had not been complied with in any manner.

24. Because said indictment attempts to charge a conspiracy to defraud the United States, but the acts alleged to have been committed to carry out said conspiracy were totally inadequate to accomplish said purpose.

25. Because it is alleged that certain false and fraudulent field-notes were filed in the surveyor-general's office for the accomplishment of said alleged conspiracy; but it appears that no final oath was ever made to said survey or field-notes.

26. Because it is nowhere averred in said indictment that said survey was not done properly and legally and in accordance with said contract by the person with whom said contract was made, and it is alleged
37 that the amounts of money in said indictment were earned by and had under said contract accrued to said Perrin, with whom said contract was made, which is equivalent to an averment that said work was properly done.

27. Because it appears upon the face of said indictment that said W. H. Brown had no authority or jurisdiction to make said contract, nor could he make said contract with Perrin, because said Perrin had not given a bond to perform said survey correctly.

28. Because said W. H. Brown had no authority in law to enter said contracts, nor any authority or jurisdiction to approve said survey or field notes, or any authority or jurisdiction to approve said accounts.

29. Because it is nowhere in said indictment alleged that said defendant had any knowledge or information that said survey or the field notes thereof were false or fictitious, or that said survey was not properly and legally made.

30. Because said indictment is ambiguous, uncertain, and unintelligible in this: That it does not inform defendant of what he is charged, nor does it sufficiently inform defendant of what he is charged to enable him to prepare for his defense.

Wherefore, defendant prays the judgment and order of this court that said indictment be declared to be insufficient in law, and the same be dismissed, and that this defendant be discharged from the premises to go hence without day.

A. P. VAN DUZER,
Attor'y for Def't Perrin.

38 I hereby certify that the foregoing demurrer is well founded in law and that it is not interposed for delay.

A. P. VAN DUZER.

(Indorsed :) Demurrer of def't Perrin.
Service of the within admitted by copy this 27 day of Jan'y, 1888.

JOHN T. CAREY,
Attorney for United States.

Filed Jan'y 27, 1888.

L. S. B. SAWYER, *Clerk.*

39 In the United States circuit court, ninth circuit, district of California.

THE UNITED STATES OF AMERICA
vs.
GEORGE H. PERRIN, JOHN MCNEE, AND John A. Benson. } No. 2143.

Demurrer of J. A. Benson.

Now comes the defendant, John A. Benson, in his own proper person, into court, and having heard read the indictment against him in this case, saith, that said indictment and the matters and things therein contained, in manner, form, and substance, the same as herein stated in each and every count of said indictment, is, and the same are, insufficient in law, and that the said defendant, John A. Benson, is not bound by the law of the land to answer the same, and this he stands ready to verify.

Wherefore, for want of a sufficient indictment herein, the said defendant prays the judgment of this court that he be by proper judgment and order of this court dismissed from said premises in said indictment specified, and that said indictment be declared illegal and insufficient.

II.

And said defendant, for further grounds and cause of demurrer to said indictment and to all the counts thereof, says that said indictment
40 in all the counts thereof is insufficient in law; that is to say,

1. Because said indictment in each and all of its counts, or in any thereof, does not charge an offense of any kind against the United States or the laws thereof, nor does it charge any act which is made a misdemeanor, felony, or any crime by the laws of the United States; nor does it charge any offense whatever.

1½. Because said indictment attempts to charge a conspiracy to defraud the United States of a certain sum of money, but does not allege that defendants or either of them knew or had any knowledge that said account was false or fraudulent, or that the claim for payment thereof was false or fraudulent; nor is it alleged that said claim was false or fraudulent.

2. Because said indictment attempts to charge a conspiracy to defraud the United States, but does not allege how or in what manner said offense was to be committed; nor does it allege any acts or circumstances constituting said offense.

3. Because said indictment attempts to charge a conspiracy to defraud the United States, but it does not allege any overt act by said defendant or either of the defendants in said indictment for the purpose of effecting the object of said conspiracy, or any overt act which could or would effect said object.

4. Because said indictment attempts to charge a conspiracy to defraud the United States by means of an alleged contract for surveying,
41 alleged to have been entered into between W. H. Brown and the defendant George H. Perrin, which contract appears to have been entered into between said George H. Perrin and said W. H. Brown, as private individuals; nor does it appear that said contract was to bind the United States, or that said W. H. Brown had any authority of law or jurisdiction to bind the United States in said contract.

5. Because it is not alleged, nor does it appear in said indictment, that the defendant, or any of his co-defendants agreed or intended or conspired to do an unlawful act, or to do a lawful act in an unlawful manner.

6. Because it appears on the face of said indictment, that the act was done in pursuance of said conspiricy, to wit: The procuring of a contract to survey public lands for said W. H. Brown was a lawful act, done in a lawful manner; nor is it averred that said defendant or any of his co-defendants had any intention of committing any fraud under or by the means of said contract; but it appears upon the face of said indictment that the utmost caution and care was taken by said defendants to incopporate in said contract such stringent provisions as would make it impossible to defraud the Government thereunder, and that the procuring of said contract was a lawful act legally and properly done.

7. Because said indictment does not aver in any of the counts thereof, that said defendants or any of them committed or did any overt
42 act for the purpose of carrying out the object of said alleged conspiracy or any act which would or could have resulted in the defrauding of the United States.

8. Because said indictment alleges that George H. Perrin procured a fraudulent survey of certain lands, and committed other alleged illegal acts for the purpose of deceiving the surveyor-general of the State of California, and thereby securing said surveyor-general's approval of an alleged survey; but it is not averred that said surveyor-general had any authority of law or jurisdiction to approve said survey.

9. Because it is alleged that one of said defendants did certain things and performed certain acts with intent to deceive the surveyor-general of California and secure his approval of certain accounts and amounts accruing to George H. Perrin, under and by the terms of said contract for surveying; but it is not alleged that said surveyor-general had any authority of law or jurisdiction to certify or approve said accounts and amounts or any account or amount.

10. Because it is alleged that one of said defendants, by certain acts therein mentioned intended to secure the approved plats and certified transcripts of the said survey to be filed in the General Land Office, with intent, etc., to secure payment for said survey; but does not aver, nor does it appear in said indictment, how or by whom said plats are to be filed or how or in what manner the United States would be led or induced
43 to pay any amount in said contract; nor is it alleged in said indict-

ment that defendants or any of them had any knowledge that the acts mentioned, or any of them would secure the payment of a large sum or any sum of money on said contract; nor is it anywhere alleged how or in what manner or by what means said fraud was to have been committed, or that defendant intended to or did do these acts fraudulently.

11. Because it is averred that said defendants procured a certain contract for surveying to be made between George H. Perrin and the surveyor-general of California; but it is not averred, nor does it appear that the United States had any interest in, or any connection with, said contract, or that the same was procured in an unlawful manner, or with any intent or purpose on the part of the defendants, or either of them, to defraud the United States.

12. Because it is alleged that, by reason of certain things done by one of said defendants, the United States surveyor-general of California was deceived into approving certain surveys and field-notes mentioned in said indictment, and deceived into stating and certifying the certain amount due under certain contracts; but it is nowhere in said indictment alleged that said surveyor-general had any authority of law or jurisdiction to do and perform said acts or any of them; nor is it averred or in said indictment shown how the doing of said acts would in any manner tend to defraud the United States.

12½. Because it is nowhere alleged in said indictment that the approval of said survey, and the approval and certifying of said accounts by said surveyor-general, would have caused, or did cause, said *said* accounts for said surveys to have been paid, or would or could have enabled defendant, or any one else, to obtain said money or any part thereof.

13. Because it appears upon the face of said indictment that the alleged false affidavit of George H. Perrin, alleged to have been made to effect the object of said conspiracy, was made before a person having no authority, power, jurisdiction, or competency to administer said affidavit; nor is it alleged that said affidavit contained any material matter or averment; nor does it appear wherein said oath was untrue. And further, that it appears on the face of said indictment that said affidavit was immaterial to any issue of fact, and was not authorized by any law of the United States.

14. Because it appears from the face of said indictment that the surveys agreed to be made in said contract were made according to law and in accordance with the terms of said contract; and that said George H. Perrin was, under the state of facts set out in said indictment, entitled to receive the sums accruing under said contract.

15. Because it does not appear in said indictment that there was any attempt made by said defendants, or any of them, to secure the approval or payment of any amounts accruing under said contracts, or to present them to any officer authorized to approve or allow them.

16. Because it appears upon the face of said indictment that said defendants, nor any of them at any time, never attempted or intended, in any way or manner, to collect any sums of money on said contract, except "in accordance with the terms of said contract."

17. Because it appears from the face of said indictment that it was impossible to collect any sums on said alleged contracts, because the surveys and field-notes were not certified by the final oath of the surveyor, as required by law and the terms of said contract.

18. Because it appears from the face of said indictment that no sums of money could, under any circumstances, be obtained from the United States on said alleged contract, because the said surveys and *and* the field-notes thereof had not been verified by the final oath required by law and the terms of said contract.

18½. Because it is not alleged in said indictment that defendants, or either of them, knew that the amounts mentioned in said indictment, as having been claimed as due for said survey, was a false or fraudulent amount or claim; nor is it alleged that said sum, or any part thereof, was false or fraudulent.

19. Because it appears from the face of said indictment that the alleged overt act committed by George H. Perrin was of no effect, because the affidavit alleged to have been made by him was made before an
46 officer incompetent to administer said oath, and having no authority so to do; nor was said oath authorized or required by law; nor is it alleged to be material to any issue; nor is it stated wherein the same is false.

20. Because said indictment and all the counts thereof are uncertain, unintelligible, and ambiguous in this: That the defendant is not informed of what the alleged offense consists, and when the acts constituting said alleged offense or the alleged overt acts were committed, or how, or in what manner, the said alleged acts would defraud the United States.

21. Because it appears from the face of said indictment that the amount thereof had been earned, and had accrued to and was due to George H. Perrin, the deputy surveyor with whom said alleged contract was made; and that the sums in said indictment mentioned were legally due to George H. Perrin, the deputy surveyor with whom said contract was made, and payable to him from the United States; and that said contract had been faithfully performed by said George H. Perrin; and that defendant and his codefendants in said indictment conspired to obtain said money in fraud of said George H. Perrin, which is not an offense against the United States.

22. Because it is not alleged in said indictment when said contract, under which said money was to be obtained, was made; or that all the moneys due thereon had not been collected; or that said contract by the conditions thereof was not forfeited.

47 23. Because it appears from the face of said alleged contract that no sums of money could be collected thereon, because the terms of said contract had not been complied with in any manner.

24. Because said indictment attempts to charge a conspiracy to defraud the United States; but the acts alleged to have been committed to carry out said conspiracy were totally inadequate to accomplish said purpose.

25. Because it is alleged that certain false and fraudulent field-notes were filed in the surveyor-general's office for the accomplishment of said alleged conspiracy; but it appears that no final oath was ever made to said survey or field-notes. Nor is it alleged that defendants, or any of them, knew that said field-notes were false.

26. Because it is nowhere averred in said indictment that said survey was not done properly and legally, and in accordance with said contract, by the person with whom said contract was made; and it is alleged that the amounts of money in said indictment were earned by and had, under

said contract, accrued to George H. Perrin, with whom said contract was made, which is equivalent to an averment that said work was properly done.

27. Because it appears upon the face of said indictment that said W. H. Brown had no authority or jurisdiction to make said contract; nor could he make said contract with George H. Perrin, because said
48 George H. Perrin had not given a bond to perform said survey correctly.

28. Because said W. H. Brown had no authority in law to enter into said contracts, nor any authority or jurisdiction to approve said survey or field-notes, or any authority or jurisdiction to approve said accounts.

29. Because it is nowhere in said indictment alleged that said defendant had any knowledge or information that said survey or the field-notes thereof were false or fictitious; or that said survey was not properly and legally made; or that the alleged claim for payment for said survey was false or fraudulent.

29½. Because it appears from the face of said indictment that defendants, or either of them, never attempted, or intended to attempt, in any manner, to present the alleged accounts for said survey to any person authorized to, or who could in any manner approve, allow, or cause any portion thereof to be paid.

30. Because said indictment is ambiguous, uncertain, and unintelligible in this; that it does not inform defendant of what he is charged; nor does it sufficiently inform defendant of what he is charged to enable him to prepare for his defense.

Wherefore defendant prays the judgment and order of this court that said indictment be declared to be insufficient in law, and the same be dismissed; and that this defendant be discharged from the premises and go hence without day.

McALLISTER & BERGIN,
49 *Att'ys for Defendant John A. Benson.*

I hereby certify that the foregoing demurrer is sufficient in law, and that the same is not interposed for delay.

HALL McALLISTER,
Counsel for John A. Benson.

(Endorsed:) Demurrer of Defendant John A. Benson to indictment.

Rec'd a copy of the within demurrer this 24th March, 1888.

JOHN T. CAREY,
U. S. Att'y.

Filed March 24, 1888. L. S. B. Sawyer, clerk.

50 At a stated term, to wit, the February term, A. D. 1888, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court-room, in the city and county of San Francisco, on Monday the 7th day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The honorable Lorenzo Sawyer, circuit judge; the honorable Ogden Hoffman, district judge.

THE UNITED STATES OF AMERICA
vs.
GEORGE H. PERRIN ET AL. } No. 2143.

Certificate of opp. of opinion.

This case was heard upon the indictment in the case, and the demurrer thereto, copies of which indictment and demurrer are hereto annexed, and hereby ordered to be made and made a part of the record of this case on certificate of opposition of opinion.

At the hearing of said case at the present term of this court upon the said papers and record, there occurred as questions arising upon said indictment, demurrer, and record, the following questions, to wit:

UNDER FIRST COUNT.

1. Do the facts stated in the first count of the indictment con-
51 stitute an offense under sections 5440 of the Revised Statutes, as amended in 1879, 1 Sup. R. S. 484, and section 5438 of the Revised Statutes?

2. Are sufficient facts stated in the first count of the indictment to make a good count under sections 5440 and 5438, Revised Statutes; or under section 5440 alone, or under section 5440 in connection with any other provision of the statutes?

3. Does the first count of the indictment sufficiently describe an offense under sections 5440 and 5438, or any other provision of the Revised Statutes, or under section 5440 alone?

4. Are the means by which the parties conspired and agreed to defraud the United States set forth with sufficient fullness and particularity in the first count of the indictment to constitute a good count in that particular?

5. Is any overt act performed by any one of the alleged conspirators to effect the object of the conspiracy sufficiently stated in the first count of the indictment to constitute a good count in that particular?

6. If there is any defect or imperfection in the first count of the indictment, is it in the matter of form only, not tending to the prejudice of the defendant, within the meaning of section 1025 Revised Statutes?

7. Does the surveying contract set out in the first count of the indict-
ment appear upon all the allegations of the count to be the individual
private contract of W. H. Brown, or a contract made in his official
52 character as surveyor-general on behalf of and binding upon the United States?

UNDER SECOND COUNT.

1. Do the facts stated in the second count of the indictment constitute an offense under sections 5440 of the Revised Statutes as amended in 1879, 1 Sup. R. S. 484, and section 5438 of the Revised Statutes?

2. Are sufficient facts stated in the second count of the indictment to make a good count under said sections 5440 and 5438, Revised Statutes; or under section 5440 alone, or under section 5440 in connection with any other provision of the statutes?

3. Does the second count of the indictment sufficiently describe an offense under sections 5440 and 5438; or any other provision of the Revised Statuest, or under section 5440 alone?

4. Are the means by which the parties conspired and agreed to defraud the United States set forth with sufficient fullness and particularity in the second count of the indictment to constitute a good count in that particular?

5. Is any overt act performed by any one of the alleged conspirators to effect the object of the conspiracy sufficiently stated in the second count of the indictment to constitute a good count in that particular?

6. If there is any defect or imperfection in the second count of the indictment, is it in the matter of form only, not tending to the prej-
53 udice of the defendant, within the meaning of section 1025, Revised Statutes?

7. Does the surveying contract set out in the second count of the indictment, appear upon all the allegations of the count, to be the individual private contract of W. H. Brown, or a contract made in his official charactor as surveyor-general on behalf of, and binding upon, the United States?

UNDER THIRD COUNT.

1. Do the facts stated in the third count of the indictment constitute an offense under section 5440 of the Revised Statutes as amended in 1879, 1 Sup. R. S., 484 and section 5438 of the Revised Statutes?

2. Are sufficient facts stated in the third count of the indictment to make a good count under sections 5440 and 5438, Revised Statutes; or under section 5440 alone, or under section 5440 in connection with any other provision of the statutes?

3. Does the third count of the indictment sufficiently describe an offense under said sections 5440 and 5438, or any other provision of the Revised Statutes, or under section 5440 alone?

4. Are the means by which the parties conspired and agreed to defraud the United States set forth with sufficient fullness and particularity in the third count of the indictment to constitute a good count in that particular?

5. Is any overt act performed by any one of the alleged con-
54 spirators to effect the object of the conspiracy sufficiently stated in the third count of the indictment to constitute a good count in that particular?

6. If there is any defect or imperfection in the third count of the indictment, is it in the matter of form only, not tending to the prejudice of the defendant, within the meaning of section 1025, Revised Statutes?

7. Does the surveying contract set out in the third count of the indictment appear upon all the allegations of the count to be the individual private contract of W. H. Brown, or a contract made in his official character as Surveyor-General on behalf of, and binding upon, the United States?

Upon which said several questions, and upon each of them, the opinions of the judges were opposed.

Whereupon, on motion of J. T. Carey, esq., United States attorney, on behalf of the United States, that the several points, and each of them, on which the disagreement happened, may, during the term, be stated under

the direction of the judges and certified under the seal of the court to the Supreme Court of the United States, to be finally decided, it is ordered that the foregoing statement of the record upon which the case was heard, and of the facts and points of difference, which is made under the direction of the judges, be entered of record, and be certified accord-
55 ingly at the request of their said attorney and counsel, and in pursuance of the law is such case made and provided.

May 7, 1888.

LORENZO SAWYER, *Circuit Judge.*
OGDEN HOFFMAN, *District Judge.*

(Endorsed:) Certificate of opposition of opinion. Filed and entered May 7, 1888. Clerk.

56 In the circuit court of the United States, of the ninth judicial circuit, in and for the district of California.

THE UNITED STATES OF AMERICA
vs.
GEORGE H. PERRIN ET AL. } No. 2143.

I, L. S. B. Sawyer, clerk of the circuit of the United States of America, of the ninth judicial circuit, in and for the district of California, do hereby certify that the foregoing fifty-five written pages, numbered from 1 to 55, inclusive, are a full, true, and correct copy of the record and of all proceedings in the above and therein entitled cause, and that the same together constitute the transcript on the certificate of opposition of opinion in said cause.

Witness my hand and the seal of said circuit court this ninth day of June, A. D. 1888.

[SEAL.] L. S. B. SAWYER, *Clerk.*

(Indorsement on cover:) No. 1035. The United States, plaintiff, vs. George H. Perrin et al. California C. C. U. S. Filed July 10, 1888.

No. 1 Original

IN THE

SUPREME COUR

OF THE

UNITED STATES.

THE UNITED STATES OF AMERICA,

vs.

GEORGE H. PERRIN, JOHN McNEE and
JOHN A. BENSON.

Brief on Behalf of the United St

A. H. G[illegible],
Attorney General for [illegible]

McALLISTER & BERGEN *and*
A. F. VAN DUZER,
Attorneys for Defendants.

Filed this ..... *day of* .....

In the Supreme Court

OF THE

UNITED STATES.

UNITED STATES,

vs.

GEORGE H. PERRIN ET ALS.

This is an indictment charging the defendants with a conspiracy to defraud the United States.

To the indictment a demurrer was interposed, stating general grounds and some thirty-two special grounds of insufficiency.

The Circuit Court divided in opinion and certified a division of opinion, propounding seven questions as to each count.

This indictment is laid under Section 5440, Revised Statutes, as amended in 1879. 1, Sup. R. S. U. S., 484.

Points and Authorities.

By this statute it is provided, "That if two or "more persons conspire * * to defraud the "United States IN ANY MANNER, * * and one "or more of such parties do *any act* to effect the "object of *the conspiracy*, all the parties to such "conspiracy shall be liable," etc.

It further provides, "That if two or more per- "sons conspire * * to defraud the United "States * * *for any purpose*, and one or more "of such parties do *any act* to effect the object "of the conspiracy, all the parties to such con- "spiracy shall be liable," etc.

Under the common law and decisions of many of the States of the Union conspiracy is defined to be the unlawful confederacy and agreement of two or more persons to do AN UNLAWFUL ACT, or a lawful act *by unlawful means*.

Com. vs. *Judd*, 2 Mass., 336.
Alderman vs. *People*, 4 Mich., 414.
State vs. *Burnham*, 15 N. H., 396.
People vs. *Mather*, 4 Wend., 229.
State vs. *Buchanan*, 5 Har. & John., 352.
State vs. *Bartlett*, 30 Maine, 132.
Com. vs. *Hunt*, 3 Metc., 123.
Russell on Crimes, Vol. 3, 116, 9th Ed.

Bishop says: "Conspiracy is the corrupt agree-
" ing together of two or more persons to do by
" concerted action something unlawful either as
" a means or an end."

Bishop Crim. Law, Vol. 2, Sec. 171.

Wharton says, "It has been conceded on all
" sides that combinations of two or more persons
" are indictable when directed either to the ac-
" complishment of an illegal object or of an
" indifferent object by illegal means."

Whart. Crim. Law, Sec. 2291, 6th Ed.

In conspiracies the thing intended need not be accomplished; the bare combination constitutes the crime; the gist of the offense is the unlawful combination and confederation.

Bish. Crim. Law, Vol. 2, Sec. 192, 6th Ed.
Com. vs. *Judd*, 2 Mass., 336.
Com. vs. *Warren*, 6 Mass., 74.
Com. vs. *Davis*, 9 Mass., 415.
State vs. *Buchanan*, 5 Harris & John., 346.
Collins vs. *The Com.*, 3 Ser. & Rawle, 222.

The foregoing definitions and decisions are noted for the purpose of showing the distinction between a conspiracy to *do an unlawful* or *criminal act*, and one to do a lawful act by *unlawful means*. The distinction is an important one to

be borne in mind in determining the sufficiency of the indictment.

The distinction observed in all the text writers on criminal law and practice and pleading, and steadily maintained by a uniform line of decisions, is, that in a charge of conspiracy to do an *unlawful or criminal act. it is not necessary to allege the overt acts* done in pursuance thereof; while if the charge be a conspiracy *to accomplish a lawful act* by unlawful or criminal means, then it is necessary and essential to state them. This is the rule of common law, and controls in the absence of statutory rule changing it.

Bishop Criminal Law, Vol. 2, 192.

Wharton lays down the same doctrine.

The leading English case is *R.* vs. *Gill*, 2 B. & Ald., 204, followed by *R.* vs. *King*, 7 Ad. & El., N. S., 721; *R.* vs. *Gompertz*, 9 Ad. & El., N. S., 824.

Mr. Wharton, in Section 2304 of his work on Criminal Law, says: "In this country *R.* vs. *Gill* "was for many years universally considered "law. How far it may be considered as shaken "by recent cases in Massachusetts and Pennsyl- "vania is, perhaps, still an open question."

In *Com.* vs. *Judd*, Parsons, C. J., says: "Cer-
" tainly, as no act is alleged, in the first count,
" to be done in pursurance of the conspiracy,
" and as the jury are silent as to the second
" count, and negative the third count, the Court
" must consider the defendant as acquitted of
" all the indictment but the first count. The
" question is, therefore, whether the conspiracy,
" as alleged in the first count, *no act being alleged*
" as done in pursuance of it, is an indictable
" offense. After fully considering the several
" cases the Court are satisfied that the gist of
" the conspiracy is the unlawful confederacy to
" do an unlawful act, or even a lawful act for
" unlawful purposes, that the offense is com-
" plete when the confederacy is made, and any
" act done in pursuance of it *is no constituent part*
" *of the offense*, but merely an aggravation of it."
Com. vs. *Judd*, 2 Mass., 336.

To the same effect is *Com.* vs. *Tibbitts*, *ib.* p. 537.
Com. vs. *Warren*, 6 Mass., page 74.

Buchanan, J., in the case of *The State* vs. *Buchanan*, affirms the doctrine laid down in the case of *The King* vs. *Eccles*, 1 Leaches' Crown Cases, 274, in the following language: "The indictment
" was for a conspiracy by wrongful and indirect
" means to impoverish one Booth, a tailor, and to

" deprive and hinder him from following and " exercising his trade. In the first count in the " indictment the object of the conspirators was " alleged to have been accomplished. and in the " second count the conspiracy only was charged. " It was not denied that the conspiracy was an " indictable offense, and the only objection on " the part of the defendant was that the acts " done to impoverish Booth ought to have been " set out in the indictment. But it was decided " by the whole Court that it was sufficient to al- " lege the conspiracy and the object of it, the " illegal combination being the gist of the " offense, and that it was not necessary to state " the means by which the intended mischief was " effected, for that the offense did not consist in " doing the acts by which the end was accom- " plished (for they might be perfectly indifferent), " but in the conspiring with a view to effect the " intended mischief *by any means*, and by Butler, " Justice, that 'the means were only matters of " 'evidence to prove the charge and not the " 'crime itself.'"

The State vs. *Buchanan*, 5 Har. & John., 346.

" At the common law the same as under this " statute, the indictment frequently mentions " things done in carrying out the conspiracy, but

" at common law they need not be proved, or if " on this point the proof varies from the allega- " tion it will do, and indeed the allegation " of overt acts in respect of the common law " conspiracy is quite unnecessary. If such alle- " gation is informal or uncertain, no harm comes " from the defect."

Bish. Crim. Law, Vol. 2, Sec. 193, 6th Ed.
Com. vs. *Eastman*, 1 Cush., 189.
The State vs. *Noyes* 25 Vt., 415.
Sydserff vs. *Reg.*, 11 Q. B., 245.

" Where the act is in itself illegal it is not " necessary to state the means by which the con- " spiracy was effected. Thus where the indict- " ment charged that the defendant conspired to- " gether by indirect means to prevent one H. B. " from exercising the trade of a tailor, and it " was contended that it should have stated the " fact on which the conspiracy was founded, the " means used for the purpose, Lord Mansfield " said: ' The conspiracy is stated, and its object, it " ' is not necessary that any means should be " ' stated;' and Buller, J., said: ' If there be any " ' objection it is that the indictment states too " ' much, it would have been good certainly if it " ' had not added by indirect means, and that will " ' not make it bad.' * * * Bailey, J., said: " ' That when parties had once agreed to cheat a

" 'particular person of his moneys, although " 'they might not have fixed on any means for " 'that purpose, the offense of conspiracy was " 'complete."

Russell on Crimes, Vol. 3, Star pages 148, 149, 9th Ed.

"And it is not necessary to state the means " by which the object was to be effected, as the " conspiracy may be complete before the means " to be used are taken into consideration. " Therefore, an indictment for conspiracy by " divers false pretenses and subtle means and " devices to get money from J. S., and cheat him " thereof, is not objectionable on the ground " that it is too general, or does not sufficiently " show the *corpus delicti* or specify any overt " act."

Russell on Crimes, Vol. 3, 146, 9th Ed. *Rex* vs. *Gill*, 2 B. & A., 204.

" So a count alleging that the defendants un- " lawfully, fraudulently and deceitfully did com- " bine, conspire, confederate and agree together " by divers false pretenses and subtle means and " devices to obtain and acquire to themselves, " from one G. W. F., divers large sums of money " of the moneys of said G. W. F., and to cheat

"and defraud him thereof, has been held "good." * *

Reg. vs. *Kenrick*, 5 Q. B., 49 (48 E. C. F. R).

"So when a count alleged that the defendants "unlawfully, fraudulently and deceitfully did "conspire, combine, confederate and agree to- "gether to cheat and defraud 'the prosecutor of "his goods and chattels,' upon error in the Ex- "chequer Chamber, it was held that this case "was not distinguishable from *Rex* vs. *Gill*, and "that the count was good."

Sydserff vs. *Reg.*, 11 Q. B., 245 (63 E. C. L. R.)

See Russell on Crimes, Vol. 3, 146, 9th Ed.

"And the doctrine is now fully settled in Eng- "land—not without some doubts having been "entertained in the earlier stages of the inquiry "—that the words unlawfully, fraudulently and "deceitfully did conspire, combine, confederate "and agree together to cheat and defraud one "'of his goods and chattels,' contain a sufficient "allegation of conspiracy without mention of "any means intended."

Bish. Crim. Law, Vol. 2, Sec. 198, 4th Ed.

People vs. *Richards*, 1 Mich., 216.

The same was held in New York before statutes passed requiring an overt act to be stated, or, rather, making an overt act a constituent element of the offense.

Bishop, in his work on Criminal Procedure, Vol. 2, Sec. 214, 2nd. Ed., in commenting on the cases in Massachusetts, holding that an indictment for a conspiracy to effect an object *not criminal* is insufficient, unless the means adopted to accomplish the object *are criminal* and are pleaded, see cases of *Com.* vs. *Eastman*, 1 Cush., 189; *Com.* vs. *Hunt*, 4 Metc., 111–125; *Com.* vs. *Shed*, 7 Cush., 514; *Com.* vs. *Prins*, 9 Gray, 127, says;

"Now if the Court, in laying down the law "thus, is to be understood as having used "language with reasonable accuracy, the mean- "ing is that there is no such thing in the law as "an indictable conspiracy unless the *means* or "the *end*, unless something contemplated is "such as if done by one alone without combin- "ation, would be indictable. * * The law of "conspiracy, according to this view, rests en- "tirely upon the doctrine of *attempt*, and the "doctrine of combination of members whereby "the power for evil is increased rendering the "combining parties punishable by *reason of the*

" *combination*, has nothing whatever to do with it. " And as a still further consequence there is " properly no law of conspiracy, but nothing is " indictable which is not either a substantive " crime or an attempt, for it should be remem- " bered when the combination is to do some in- " dictable thing, either as a means or an end, it " is as well punishable under the name attempt " as under the name of conspiracy."

The same author in Section 217, same volume, further commenting, says: " But if the law is as " it is believed by the author to be, that, for the " act of combining to become a criminal act, " there is no need the *purpose* of the combination " should be to commit what if done by one " alone would be a *criminal thing*, either as a " *means* or an *end*, then it is not necessary the " indictment should allege such purpose; but it " must allege *some purpose* which, added to the " act of combining, will show the act of combin- " ing to be indictable. He illustrates by saying: " ' It is not, of course, indictable for one indi- " ' vidual alone to ' cheat and defraud ' another, " ' but according to the better doctrine it is in- " ' dictable for two persons to combine to ' cheat " ' and defraud ' a third person. Therefore the " ' indictment in this general form is suffi- " ' cient.' "

The form alluded to will be found in section 207, same volume. They are as follows :

" That A. and B. of &c., at &c., unlawfully did " conspire and combine together by divers false " pretenses and subtle means and devices to ob- " tain and acquire to themselves of and from F. " and G. divers large sums of money of the res- " pective money of the said F. and G., and to " cheat and defraud them respectively thereof to " to the great damage," etc.

Again :

" That A, etc., unlawfully, fraudulently and de- " ceitfully did conspire, combine, confederate " and agree together to cheat and defraud F. of " his goods and chattels."

Again the same author in section 219, same volume, says :

" But if it is also the law that when to the " act of conspiring there is added the intent to " cheat and defraud a particular third person, " though *such means* are not contemplated as *are* " *indictable* when employed by one, then the same " form of allegation must be sufficient in this " case as in the other."

The other case he refers to is stated in section 218, same volume, which is when the conspiracy

was to effect an unlawful or *criminal act* in which all the cases hold that it is not necessary to allege the means, but that it is sufficient to charge the thing intended in general words, and the means to accomplish it need not be alleged.

Conspiracy is a mere " agreeing together," not necessarily otherwise an act.

Bishop Crim. Law, Vol. 2, Sec. 172, 6th Ed.

The general principle on which the crime of conspiracy is founded is this, that the confederacy, combining of will and effort of several persons to effect an injurious object creates such a new and additional power to cause injury as requires criminal restraint.

Bishop Crim. Law, Vol. 2, Sec: 180, 6th Ed.

Several principles are established by the authorities cited.

I.

That the gist of the offense is the unlawful combination and agreement to defraud, and is complete without the means being agreed upon, and that the means used and acts done in pursuance of it are *no constituent elements* of the

offense and are but *matters of evidence* to prove the charge and not the crime itself.

State vs. *Buchanan*, 5 Har. &, John *supra*.

Com. vs. *Hunt*, 4 Metc., *supra*.

Com. vs. *Warren*, 6 Mass., *supra*.

Com. vs. *Davis*, 9 Mass., *supra*.

Collins vs. *The Com.*, 3 Ser. & Rawle, *supra*.

Com. vs. *Judd*, 2 Mass., *supra*.

Bish. Crim. Law, Vol. 2, Sec. 192, 6th Ed.

Reg. vs. *Kenrich*, 5 Q. B., 49, (48 E. C. L. R.)

Bish. Crim. Law, 2d Vol., Sec. 198, 4th Ed.

Peop. vs. *Richards*, 1 Mich., 216.

U. S. vs. *Donaty*, 11 Blatch., 169-170.

U. S. vs. *Boyden*, 1 Low, 268.

II.

That an indictment charging a conspiracy to defraud another of his property need not allege the means by which the conspiracy was to be effected.

Bish. Crim. Law, Vol. 2, Section 192, 6th Ed.

R. vs. *Gill*, 2 B & Ald., 204.

R. vs. *King*, 7 Ad. & El., N. S., 721.

R. vs. *Gompertz*, 9 Ad. & El., N. S., 824.

U. S. vs. *Dustin*, 2 Bond., 334.

U. S. vs. *Dunee*, 3rd Woods, 48.
U. S. vs. *Sanche*, 7 Fed. Rep., 715.
U. S. vs. *Gordon*, 22 Fed. Rep., 251.

III.

That an indictment charging a conspiracy to commit a substantive crime need not allege the means agreed upon to accomplish the crime, nor by which it is attempted.

Russell on Crimes, Vol. 3, Star page 148–9, 9th Ed.

Bish. Crim. Law, Vol. 2, Sec. 198, 4th Ed.
Bish. Crim. Law, Vol. 2, Secs. 214, 217, 218 and 219.

See also cases cited under points one and two.

IV.

That if acts done to carry out the conspiracy are alleged they need not be proved, and a variance in proof is immaterial, and if the allegations of these acts are informal or uncertain, there is no harm.

Bish. Crim. Law, Vol. 2, Sec. 193, 6th Ed.
Carr vs. *Eastman*, 1 Cush., 189.
State vs. *Noyes*, 25 Vt., 415.
Sydserff vs. *Reg.*, 11 Q. B., 245.

V.

That it need not appear upon the face of the indictment in what manner the act alleged to effect the object of the conspiracy would tend to consummate it.

U. S. vs. *Donaty* 11 Blatch., 169–70.

For two or more persons to conspire to defraud the United States in any manner, or for any purpose, is made a substantive crime by Sec. 5440 of the Revised Statutes, U. S.

Under this section it is made a crime to conspire to defraud the United States in any conceivable way, and every possible way. The gist of the offense is the combining of two or more for the purpose of defrauding, and with the intent of defrauding the United States. The methods, instrumentalities and means they may adopt in carrying out their purpose, or in attempting their purpose, is no part of the crime. After the agreement and combination to defraud the United States is entered into, the crime is complete. The combination has been made and the unlawful purpose or object agreed upon. How the unlawful object is to be attempted to be accomplished, whether by adequate or insufficient means, whether by innocent acts within themselves, or unlawful acts, is not material.

The means adopted, the steps taken, are but evidence that the conspiracy was not abandoned, but become operative.

Lord Denman said in *Rex* vs. *Kenrick*, 5 A. & E. N. S., 49, in speaking on the sufficiency of an indictment for conspiracy: "The offense has "been held to consist in the conspiracy and not "in the acts committed for carrying it into "effect."

Whart. Prec., Form 611, Note J.
Whart. Prac. & Pl., Sec. 253, 8th Ed.
State vs. *Buchanan*, 5 Har. & John. *supra.*
United States vs. *Britton*, 108 U. S., 204.

"The unlawful agreement is the gist of the "offense which this section intended to create. "The requirement that some act to effect the "object of the conspiracy be done by some one "of the conspirators is intended to afford a *locus* "*penitentiæ.* Until some act be done by some "one of the conspirators to effect the object of "the unlawful agreement, all parties to the "agreement may withdraw, and thus escape the "effect of the statute. The act to effect the ob-"ject of the conspiracy which the statute calls "for is not designed as an overt act, *and was not* "intended to be made an element proper of the "offense. *The offense is the conspiracy.* Some

" act by some one of the conspirators is required " to show, *not the unlawful agreement*, but that the " unlawful agreement while subsisting became " operative. The offense of conspiracy is com- " mitted when to the intention to conspire is " added the actual agreement; and this intent to " conspire, coupled with the act of conspiring, " completes the offense intended to be created " by the statute, notwithstanding the require- " ment that the prosecution show by *some act* of " some one of the conspirators that the agree- " ment went into actual operation. If, then, an " indictment correctly charges an unlawful com- " bination and agreement actually made, and in " addition describes *any act* by any one of the " parties to the unlawful agreement as an act in- " tended to be relied on *to show the agreement* " *in operation*, it is sufficient, although *upon the* " *face of the indictment it does not appear in what* " *manner the act described would tend to effect the ob-* " *ject of the conspiracy.* It is sufficient if the act " be so described as to apprise the defendant " what act is intended to be given in evidence as " tending to show that the unlawful agreement " was put in operation, *without its being made to* " *appear to the Court upon the face of the indictment* " *that the act mentioned is necessarily calculated to* " *effect the object of the unlawful combination charged.*

" The crime is committed when the combination
" is made, and the act of one of the conspirators
" is not required by the statute to show the in-
" tent. That is inferred from the unlawful act
" of combining to defraud * * * but the
" object of requiring proof of some act in fur-
" therance of the unlawful agreement is to show
" that it became a living, acting combination."

U. S. vs. *Donaty*, 11 Blatch., 169–70.

The gist of the offense is the unlawful agreement. *The acts in furtherance or to effect the object of the conspiracy are no part of the offense, and may be innocent in themselves*, and any language which shows that an act has been done to carry out the agreement is sufficient.

United States vs. *Boyden et al.*, 1 Low., 268.

The objection to the indictment in the following case was that it did not set out the means by which the defendants proposed to effect the fraud charged. The Court said: " The Court is
" aware of no authorities requiring in an in-
" dictment for a conspiracy under Section 30 of
" this statute (same as Sec. 5440), that in aver-
" ring the fact that the defendants agreed to-
" gether to commit a criminal act or perpetrate a
" fraud, the specific mode agreed upon by which

" the object of the conspiracy was to be carried "out should be averred."

U. S. vs. *Dustin*, 2 Bond, 334.

To the same effect is—

U. S. vs. *Dunee*, 3d Woods, 48.

U. S. vs. *Sanche*, 7 Fed. Rep., 715.

State vs. *Younger*, 1 Dev., 357.

The case of *United States* vs. *Sanche* was an indictment for conspiracy to plunder certain goods and merchandise, etc., then and there belonging to the steamboat City of Vicksburg, the said steamboat being then and there wrecked and in distress, etc., alleging it to be within the admirality and maritime jurisdiction of the United States, etc., and " that to effect the object of " the said conspiracy the said Hercules Sanche " then and there furnished and loaned to the " said John Woods and Elias Boatright a certain " skiff, to be used by them, the said Woods and " the said Boatright, in plundering said goods " and merchandise from the said steamboat."

The indictment was laid under Section 5440 Revised Statutes U. S.

The Court, in passing on the sufficiency of this indictment, in speaking of the object of this section, says: " Its object is to make it a crime to

" conspire to commit a crime, although the con-
" spiracy be not consummated. * * * *

"Another objection urged to this indictment
" is, that it does not allege any act of any one of
" the alleged conspirators to effect the object of
" the conspiracy. * * * It is said that only
" a verbal act is averred by the word 'loaned,'
" which is not sufficient to meet the statute."

The Court, after quoting approvingly from *U. S.* vs. *Donaty*, 11 Blatch., *supra*, and *U. S.* vs. *Boyden*, 1 Low., *supra*, and particularly the latter case, as follows:

" The acts set out are no part of the offense,
" *and may, in themselves, be innocent.* The pur-
" pose of the law is that a mere agreement,
" however corrupt, shall not be punished as a
" crime unless it has led to some overt act, and
" any form of language which shows that such
" an act has been done to carry out the agree-
" ment is sufficient." The Court further commenting on the indictment in the case at hand said: " But the language is 'furnished and
" loaned,' which necessarily implies, I think, the
" act of putting the skiff within their control
" and answers the statute. *Whether the act was*
" *one tending to effect the object of the conspiracy is a*

" *question for the jury on the proof.* but certainly the " pleading is sufficient."

Seventh Fed. Rep., 718–19–20.

In commenting on what the crime of conspiracy to defraud the United States is, under Section 5440, R. S. U. S., Nixon, D. J., in the case of *United States* vs. *Sacia*, says:

" The offense, you perceive, consists in two or " more persons conspiring to defraud the Gov- " ment *in any manner whatever*, in a case where " one or more of the parties to the conspiracy " shall do any act to effect the object that is to " effect the fraud. It need not be successful. " It may fall short of the fraud. Merely agree- " ing or combining together to commit the fraud " is sufficient to constitute the offense without " any loss to the Government if any one of the " parties has taken a step towards its execution. " The section is very sweeping in its terms, and " was doubtless intended to meet the party to " the fraud against the Government on *the very* " *threshold* of the perpetration of the crime, and to " render him liable to its penalties before the " consummation of the fraud."

2nd. Fed. Rep., page 755.

In the case of the *United States* vs. *Gordon*, Nelson, J., in passing on the sufficiency

of an indictment, the first count of which simply charged a conspiracy to defraud the United States without setting forth the means by which the fraud is to be consummated, says: "The first count is good. The Sec- "tion of the Statute (5440) makes it a "crime to conspire to defraud the United "States *in any manner*, and the cases from "the State Courts which hold that a con- "spiracy to defraud is not criminal unless it is "a conspiracy to defraud in a manner made "criminal by statute, have no application to in- "dictments under Section 5440. It is *immaterial* "*what means* were used to defraud, as it is crim- "inal to conspire to defraud the United States "*in any manner or for any purpose*, and the Court "does not care to know whether the modes "adopted to accomplish the end proposed are "made criminal or not."

22d Fed. Rep., 251.

It is sufficient to charge a conspiracy to defraud to allege that "A. B., of etc., on etc., at "etc., unlawfully, fraudulently and deceitfully "did conspire, combine, confederate and agree "together to cheat and defraud 'one' of his "goods and chattels."

Bishop Crim. Law., Sec. 198, 4th Ed.

Russell on Crimes, Vol. 3, 146, 9th Ed.

People vs. *Richards*, 1 Mich., 216.
Rex vs. *Gill*, 2 B. & A., 204.
Sydreff vs. *Reg.*, 11 Q. B., 245 (63 E. C. L. R.)

In passing upon the question of the Statute of Limitations interposed to an indictment for conspiracy, Judge Deady said: "The general "rule is that the statute begins to run from the "commission or consummation of the crime. "When was this crime consummated? The con- "spiracy was formed on July 1, 1881, and the "first act done by any of the conspirators in "pursuance thereof was the making of the "alleged affidavits by Ankenny, etc. The crime "was then consummated."

The indictment charged several acts of much later dates, and it was contended that the crime was not consummated until the last act was done in pursuance of the conspiracy, but the Court held that the first act showing that the conspiracy had become operative fixed the time when the statute began to run.

United States vs. *Owens*, 32 Fed. Rep.. 537.

From the authorities it appears settled that the act to be done by one of the conspirators may be innocent in itself.

That the act done by one of the conspirators is no part of the crime but merely evidence of the unlawful agreement and conspiracy, and that it became operative.

That the conspiracy once put in operation by any act done by one of the conspirators becomes a consummated crime.

That any act done in pursuance of the conspiracy by one of the conspirators is sufficient to ripen the agreement or conspiracy into a consummated crime.

That it is not necessary to aver that the act done was 'to effect the object of the conspiracy."

U. S. vs. *Boyden*, 1 Low, 267.

That it is not material whether the act done is criminal, unlawful or innocent, only that it was an act following the agreement and conspiracy, and evidence of the fact that it was not abandoned but put in operation.

If *any act* done by one of the conspirators in pursuance of the conspiracy is sufficient to constitute the offense, it is not necessary to allege but *one act* in the indictment, and since said act may be innocent in itself, that is, a

lawful act, it may be alleged in any manner sufficient to apprise the defendant of the act or evidence that will be relied on to prove that the conspiracy became operative.

If the theory contended for by the defense is the true one that the acts alleged must be unlawful in themselves, then the words "any act," used in the statute, are to be construed arbitrarily and with a qualification not to be found in the statute.

It need not appear by the indictment in what manner the act would tend to effect the object of the conspiracy. The intent is not to be shown by the act required by the statute—that is inferred from the unlawful act of combining to defraud.

U. S. vs. *Donan*, 11 Blatch., 168.
U. S. vs. *Sanche*, 7 Fed. Rep., 715.
U. S. vs. *Gordon*, 22 Fed. Rep., 251.

It is not necessary that the means adopted and the acts done should be effectual or calculated to accomplish the object of the conspiracy. Cases hereinbefore cited, and

1 Hawk P. C., 72 P. P., 3.
Rex vs. *Rispal*, Bl. Rep., 368.

Were it otherwise there would be ample pro-

visions for prosecutions found in the *law of attempts* to commit the crimes or frauds inhibited.

The offense defined and punished by Section 5440 R. S. U. S., is the unlawful conbining and confederating of two or more to commit a crime or *to defraud* the United States. It is the concerted combined wills and efforts of two or more agreeing together to do the things prohibited, and in the language of Judge Nixon in the case of *United States* vs. *Sacia*, 2 Fed. Rep., page 755, "The section is very sweeping in its terms, and "was doubtless intended to meet the party to "the fraud against the Government on the very "threshold of the perpetration of the crime, and "to render him liable to its penalties before the "consummation of the fraud."

Most frauds against the Government are to be perpetrated through the means of false and fraudulent claims made or caused to be made against the Government. Penalties are provided for these offenses in Section 5438 R. S. U. S.

Section 5440 R. S. U. S., reaches back beyond the making or causing to be made a false claim upon or against the Government, and where two or more conspire and agree together *to make* a false claim provides a penalty.

Section 5438 punishes *the act* of one person in

making or causing to be made a false claim, etc., while Section 5440 punishes the purpose, intent and wills of two or more persons when combined *to make or cause to be made false claims.* The combination or conspiracy is the offense.

In view of the authorities cited and the principles established and sustained by them, let us test the sufficiency of the indictment and answer the questions propounded by the divison of opinion certified.

By the precedents hereinbefore cited it is sufficient to allege a conspiracy to defraud in the following form: That, A and B, of etc., on etc., at etc., unlawfully, fraudulently and deceitfully did conspire, combine, confederate and agree together to cheat and defraud the United States of a sum of money, or its goods and chattels.

This form of charging a conspiracy to defraud under the section in question, is sustained in

United States vs. *Dunee*, 3 Woods, 47.
Russell on Crimes, Vol. 3, 146, 9th Ed.
Bish. Crim. Law, Vol. 2, Sec. 198, 4th Ed.,

and cases hereinbefore cited.

In the case of the *United States* vs. *Dunee*, 3rd Woods, *supra*, the indictment passed on is set out in full. It is as follows:

It charges "That Harriet A. Mills and others, "late of etc., * * * on etc., * * * at "etc., * * * with force and arms unlaw- "fully and wickedly did conspire, combine, "confederate and agree together and among "themselves, and with Martin L. Knight and Jo- "seph P. Murphy * * and divers other evil "disposed persons whose names are as yet to the "Grand Jurors unknown, unlawfully and fraud- "ulently to defraud the United States of a large "sum of money, to wit: forty thousand dollars "lawful money of the United States, of the "property and moneys of the United States."

This was held a sufficient charge as to the conspiracy.

So we say in each of the counts in the indictment under consideration, the conspiracy is sufficiently charged. It is as follows: "The Grand "Jurors of the United States of America of said "Circuit Court within and for the District afore- "said, on their oaths aforesaid present that "George H. Perrin, John McNee and John A. "Benson, late of the District of California, here- "tofore, to wit: on the 2d day of December, in "the year of our Lord one thousand eight hun- "dred and eighty-four, at the City and County "of San Francisco, State and District of Califor-

" nia, and within the jurisdiction of this Honor-
" able Court, did unlawfully, corruptly and wick-
" edly conspire, combine and agree together, and
" with divers other persons to the said Grand
" Jurors unknown, to defraud the United States
" of a large sum of money, to wit: the sum of
" four hundred and ninety-two dollars, lawful
" money of the United States."

This, we say, charges a conspiracy, and is sufficient for that purpose.

The combination is alleged and the object of the conspiracy is named, to-wit, " to defraud the United States."

This is prohibited by Section 5440 R. S. U. S., and made a *substantive statutory offense.*

This is followed by allegations of several acts in each count done by one of the conspirators to effect the object of the conspiracy, any one of which is sufficient as evidence that the conspiracy became operative. In the light of the authorities this is all that is required.

From the fact that several acts are alleged where the statute requires but *one*, and that *any act* done by one of the conspirators in pursuance of the conspiracy, does not make the indictment bad, nor does not make the rule more stringent

as to the method of pleading the facts or acts relied on.

Russell on Crime, Vol. 3, star page 148–9, 9th Ed.

Quotation from Butler, J., page 7, *supra.*

This is not a charge of conspiracy to accomplish a *lawful object by unlawful means.* If it were I would concede that it was necessary to set out the means with the strictest technical requirements that the Court might be able to determine whether the means alleged were unlawful. On the contrary, this is a charge of conspiracy to do an *unlawful act*, an act prohibited by statute and made a substantive offense, to-wit, "to conspire to defraud the United States." The uniform rule of pleading in such cases exempts the pleader from the necessity of setting out the means or the manner.

But the statute requires that some act shall be done by one of the conspirators, which act all the authorities hold need not be an unlawful act, but may be innocent in itself, and they further hold that it is no part of the crime. nothing but evidence that the crime was committed, that the conspiracy became operative; (*State* vs. *Buchanan*, 5 Har. & John., *supra*; *U. S.* vs. *Donan*, 11 Bla., *supra; U. S.* vs. *Sanche*, 7 Fed. Rep., *supra;*

U. S. vs. *Boyden*, 1 Low., *supra*,) and that it is not necessary that the indictment should show in what manner the act described would tend to effect the object of the conspiracy (*U. S.* vs. *Donan*, *supra*,) and it is sufficient to so describe the act that the defendant may be apprised what act is intended to be given in evidence tending to show that the unlawful agreement was put in operation. *U. S.* vs. *Donan*, *supra*, and *U. S.* vs. *Boyden*, *supra*.

If this be the law, we submit that the acts set out in each of the counts of the indictment is sufficient to apprise the defendants that the Government will give in evidence the contract entered into by the defendant Perrin with United States Surveyor-General Brown, to survey certain public lands therein described, the field notes of said survey, proof that the survey was not made in conformity with the contract in the respects mentioned in the indictment; that it was a fraudulent, pretended and fictitious survey; that the field notes were false, fictitious and fraudulent, etc.

The theory of the defense is that the indictment should state the means adopted to accomplish the object of the conspiracy—should show the manner by which they intended to defraud

the Government. That it should show that the means, methods and manner adopted and the acts done would have resulted in defrauding the Government; in other words, that the means adopted and the acts done are constituent elements of the offense, and not mere evidences of the fact that the conspiracy to defraud the United States became operative. We submit, in the light of the authorities cited, and upon principle, this is not the law.

If the theory of the defense be correct, then every conspiracy to defraud the Government in any manner that proved abortive because detected before consummated, or because the means adopted and the *acts agreed* to be done were not sufficient to accomplish the object, and were different from those practiced in the course of the consummation of the object, that a prosecution would not lie. The first step in a conspiracy is the unlawful combining and agreeing together of two or more persons to do some unlawful act, or a lawful act by unlawful means. In either case the law punishes for this unlawful combination and agreement and not the acts done in furtherance of it. Where the conspiracy was to do a lawful act by unlawful means, and the unlawful means or acts were criminal in themselves, such criminal acts might be punished instead of the

conspiracy, at the election of the Government, but not both. But the case in hand is not a conspiracy to defraud the Government *by unlawful* or *criminal* means, but *in any way or manner whatever*.

Now upon the theory of the defense that the means are a constituent element of the offense, and that they must be shown to be calculated to, and that they would defraud the United States, the fundamental idea and principle underlying the offense of conspiracy is eliminated from the offense, to-wit: the danger incident and increased power for evil of combined wills and efforts of two or more persons. The evil aimed at is the combining and confederation of two or more persons to commit some crime against, or to defraud the United States.

Upon the theory that the acts done must be calculated to accomplish the object of the conspiracy, and shown to be so by the indictment, they must, of necessity. be held to be constituent elements of the offense and not merely evidences of it, and of course must have been agreed upon at the time the conspiracy was formed. But this cannot be; because a conspiracy might be formed to commit a crime, and as well to defraud without fixing upon the

means or the part each was to play until afterwards, and it would not be difficult to imagine a case where each of the conspirators were left to his own discretion to do such things in pursuance of the conspiracy from time to time, as the case might suggest, to enable its successful consummation. Yet, would it be contended that all were not bound by the acts of the other, and that because the acts or means had not been agreed upon, there was no conspiracy? Again, suppose that the means were agreed upon, and there were several successive steps or acts necessary to be done in order to accomplish the object of the conspiracy, as there were in the case at bar, and some one of the latest successive acts in the consummation of the offense, such for instance, as making a certain affidavit, and it was agreed that a certain one of the conspirators should go before a certain officer agreed upon, to execute the affidavit; and that, as a matter of law, the officer agreed upon had no authority to administer the oath, and from the fact that such officer did not have authority to administer the oath, the object of the conspiracy must fail and the object of defrauding the Government never could be accomplished. Would it be seriously contended that the crime of conspiracy had not

been committed? If the means agreed upon are constituent elements of the offense and must be calculated or sufficient to accomplish the object of the conspiracy, then any mistake in law or fact made in the calculation that entered into the agreement, which would render the accomplishment of the object of the conspiracy a failure, would be a defense upon the ground that the means agreed upon could not have brought about the object aimed at.

In the case at bar there were several successive steps essential and necessary to be done in order to make the conspiracy to defraud sufficient to consummate the fraud conspired to be perpetrated.

First—It was necessary to have some one appointed a United States Deputy Surveyor.

Second—To obtain a contract for surveying public lands.

Third—Making a pretended survey in the field.

Fourth—Preparing field notes and making final oath to them.

Fifth—Returning the field notes to the U. S. Surveyor-General for his approval.

The remaining matters and things to be done in order to secure the contract price, were to be

done by the officers of the Government. The Surveyor-General is required to plat the work and test it, and if found correct he approves the field notes and sends certified transcripts of them and the plats to the Commissioner of the General Land Office for his approval. The Surveyor-General also, if the field notes are found correct and approved, certifies to the amount due on the contract, the basis of which is the survey itself, showing the number of miles surveyed, the price being fixed at so much per mile, and the accounts so certified by him are forwarded to the Commissioner of the General Land Office, who is authorized to audit and certify them to the First Comptroller for payment.

Section 456, Revised Statutes U. S.

Of all the acts required to be done by the U. S. Deputy Surveyor, the only one by which he could commit a crime is making the final oath to the field notes, wherein and whereby he might commit perjury. (See oath required by Manual of Instructions, page 46.)

This oath is to be affixed to the true field notes returned to the Surveyor-General. (Page 45, same Manual.)

If he took the oath before an officer not authorized by the laws of the United States to ad-

minister it, then he would not even commit perjury. And let it be observed that it is contended in all these cases that the officers, to-wit: Notaries Public and Court Commissioners, who administered these oaths, had no authority to do so. If this position can be maintained, then the whole scheme agreed upon in these cases to defraud the Government was to be effected by innocent acts—acts not made criminal—and, in fact, by means which were insufficient in law to accomplish the object aimed at, but which, in point of fact, by the practice of the Department, would have been effectual.

But would it be contended, because the means agreed upon and the acts done, were all innocent, not criminal, and ineffectual in law to accomplish the object of the conspiracy, that therefore no crime had been committed? It seems to me that this proposition is maintainable if the means agreed upon, and the acts done, are constituent elements of the offense. But in the light of the authorities, and as well upon principle, they are not constituent elements of the offense, and therefore it need not appear either upon the face of the indictment nor in proof that they were sufficient, adequate or effectual to accomplish the object of the conspiracy; but rather, that the offense consists

alone in the unlawful confederation and agreement to do the thing prohibited by statute, and that any act showing that the conspiracy became operative is sufficient (*U. S.* vs. *Donan*, *supra*, and *U. S.* vs. *Boyden*, *supra*, and other cases cited), and that the same may be alleged in any language which will apprise the defendant of the acts relied on as evidence that the conspiracy became operative. If the principles announced in the authorities are true, then we say Questions Nos. 2, 3, 4, 5 and 6, propounded by the certificate of division of opinion as to the three counts in the indictment, in so far as they pertain to Section 5440 of the Revised Statutes alone, must be answered in the affirmative.

This brings us to the 7th question propounded, and is a question common to each count of the indictment, viz: "Does the surveying con-" tract set out in the first, second and third " count of the indictment appear upon all the " allegations of the several counts to be the in-" dividual private contract of W. H. Brown, or " a contract made in his official character as " Surveyor-General on behalf of and binding " upon the United States?"

The material averments found in the indictment that fully answer this question are as follows:

"Did then and there procure, secure and "cause to be entered into a contract by and be- "tween the said George H. Perrin, then and "there being a deputy United States Surveyor "in and for the State of California, on the one "part and W. H. Brown, then and there being "the United States Surveyor-General in and for "the State of California on the other part, "whereby the said defendant George H. Per- "rin, in his said capacity aforesaid * * under- "took, etc., for a price, (stating it,) to well, "truly, etc. * * in strict conformity *with the laws "of the United States*, the printed manual of sur- "veying instructions, and other surveying "instructions *issued by the Commissioner of "the General Land Office*, and with such special in- "struction as he may receive *from the Surveyor- "General* in conformity therewith, survey, etc., "certain lines of certain public lands" * * * describing the lands, "which said lands are "public lands of the United States, and were "and are situate, etc. * * and return the true "field notes thereof *to the office of the* SAID SUR- "VEYOR-GENERAL on," etc.

"And it was further stipulated * * * "between said * * United States Deputy- "Surveyor as aforesaid, and the said W. H. "Brown, United States Surveyor-General of the "aforesaid * * * that the surveys * * *

" should not be commenced before the said " * * defendant should be OFFICIALLY notified " by the SAID SURVEYOR-GENERAL of the APPROVAL " of the aforesaid contract *by the Commissioners of* " *the General Land Office.*"

" And it was further stipulated and agreed by " and between the said George H. Perrin, United " States Deputy-Surveyor, as aforesaid * * " and the said W. H. Brown, United States " Surveyor-General of aforesaid, and under a con- " dition of the aforesaid contract that no ac- " counts should be paid for the surveys in said " contract stipulated to be made unless properly " certified by the said *W. H. Brown in his* OFFI- " CIAL CAPACITY AFORESAID, and by *his successor in of-* " *fice* in *such official capacity*, should the said W. H. " Brown for any cause cease *to be such officer afore-* " *said;* that such surveys were in accordance with " the instructions * * * * and until *ap-* " *proved plats and certified transcripts of the field notes* " *of the surveys to be made by him* the said George " H. Perrin, and for which accounts should be " rendered, *were filed in the General Land Office.*" * * * "*which said contract was duly approved* " *by the Commissioner of the General Land Office.*" (giving the date) * * "of which said approval " the said George H. Perrin was thereafter *officially*

" notified by the *United States Surveyor-General* of " the State of California."

From all the allegations recited, can there be any question as to whether this was a contract about a public matter a matter in which the United States alone was concerned, and in which W. H. Brown, the United States Surveyor-General represented the Government, and was its agent.

The United States Surveyor Generals are directed and authorized to make certain surveys, and authorized to engage skillful surveyors as their deputies for that purpose, and to enter into contracts for surveys. Sec. 2223 Revised Statutes U. S., Manual of Instructions, page 16.

"Contracts executed by agents or officers of " the Government in their own names *and pur-* " *porting* to be made by them on behalf of the " Government, binds the Government," and does not bind them individually.

Story on Agency, Sec. 302–303.

The contract as alleged shows that it was in the line of duty of the United States Surveyor-General, that it was for the survey *of public lands of the United States*, that the contract had to be approved by the Commissioner of the General Land Office, and was approved by him. That the Deputy Surveyor was not to commence the work until *officially* notified by the *United States Sur-*

veyor-General that the contract had been approved by the Commissioner of the General Land Office. That he was so notified. That the work had to be done in conformity with the laws of the United States and the manual of surveying instructions issued by the Commissioner of the General Land Office, and with such special instructions as might be given by the Surveyor-General. That the field notes were to be returned to the office of the United States Surveyor-General. That no payments should be made for said surveys unless the accounts were properly certified by the United States Surveyor-General *in his official capacity*, nor until approved plats and certified field notes were filed in the General Land Office. It being a contract in the line of his official duty, and concerning a public matter, and in which the Government alone was concerned, and approved by the Commissioner of the General Land Office, bound the United States. It is apparent from the allegations that the survey contracted for was for the use and benefit of the United States.

Section 2398 Revised Statutes U. S.

Walker vs. *Swartwout*, 12 John., N. Y., 448–9 & 50.

Belknap vs. *Reinhart et al.*, 2 Wend., 377.

Hodgson vs. *Dexter*, 1 Cranch., U. S., 362.

The contract passed on in the last case will be found on pages 345 and 346.

The last case is cited approvingly in

Garland vs. *Davis*, 4 How., 148.

Sheets vs. *Selden's Lessees*, 2 Wall., 187.

The authority of an officer is a matter of law. (Rule 13 Lawson's Presumptions.)

In view of the allegations of the indictment setting out the substance of the contract and the cases cited, we submit that the 7th question must be answered by holding it to be a contract made by W. H. Brown in his official character as United States Surveyor-General on behalf and in the interest of, and binding upon the United States.

The Manual of Instructions cited from has the binding force and effect of law.

Section 2399 Revised Statutes U. S.,

And becomes a part of every contract for the survey of public lands.

Section 2398 Revised Statutes U. S.

The form of the contract is prescribed by said manual, see page 16. The final oath is prescribed by the manual, see pages 46 and 108. Specimen field notes are given, pages 63 to 109 inclusive.

What shall be noted in the field notes is prescribed on pages 42,—3 and 4. The true field notes shall be returned to the Surveyor-General. See page 42 of Manual, also Section 2395, Revised Statues U. S.

It is stated as a special ground of demurrer to each count in the indictment, that it is not alleged that the Suveyor-General was authorized by law to certify to the accounts or to approve the surveys, or by whom approved plats and certified transcripts of the field notes were to be filed in the General Land Office.

To which we make answer:

First—That in the light of the authorities hereinbefore cited, it is not necessary that it should appear upon the face of the indictments that the means adopted or the acts done should be calculated to or would accomplish the fraud, and that they are not constituent elements of the offense, but merely evidences that the conspiracy became operative. That the statute only requires any act done by one of the defendants in pursuance of the conspiracy, and not acts or authority of others.

Second—It is alleged in all the counts that it was stipulated in the contract that the Survey-

or-General should in his official capacity certify to the accounts before payment. That in the second and third counts it is expressly alleged that the Surveyor-General was "thereto authorized and empowered by law so to do," and in the third count it is also expressly alleged that the Surveyor-General was authorized by law to approve the survey.

Third — That it is a matter of law as to whether the Surveyor-General had authority to approve surveys *and* certify accounts, and by whom approved plats and certified transcripts of the field notes should be filed in the General Land Office.

The Surveyor-General is required to send copies to the General Land Office.

Sec. 2395, Revised Statutes U. S.

The authority of an officer is a matter of law.

Rule 13, Lawson Presumptive Evidence.

All are presumed to know the law, therefore it is not necessary to allege the authority of an officer whose authority is measured by the law.

Whart. Crim. Evidence, Sec. 723, 8th Ed.

If the authority was alleged it could only be proven by exhibiting the law, but the Court

takes cognizance of the law, and hence it is not necessary to allege it.

Bishop Crim. Proc., Vol. 1, Sections 329, 330 and 331.

So that we submit that the acts done in pursuance of the conspiracy being no constituent elements of the offense, and it not being necessary that it should appear upon the face of the indictment that the acts agreed upon or done should be effectual to accomplish the object of the conspiracy, that it is immaterial whether the Surveyor-General had authority to do any of the acts mentioned or not; and further, that whatever authority he possessed in the premises is a matter of law and not fact, and need not be alleged in any view of the case.

Lastly, that his authority is alleged.

Do the facts, stated in the first, second or third counts, constitute an offense under Section 5440 and 5438, Revised Statutes.

It is made an offense under Section 5438 R. S. U. S., for any one to make, or cause to be made, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious or fraudulent.

It is made an offense by said Section 5438, for any one to present or cause to be presented for payment or approval to any officer in the Civil Service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious or fraudulent.

It is made an offense by said Section 5438, for any one who, for the purpose of obtaining or securing the payment or approval of any false, fictitious or fraudulent claim, makes or uses any false affidavit. knowing the same to contain any fraudulent or fictitious statement.

To determine whether either of the counts of the indictment state an offense under this section in connection with 5440 R. S. U. S., it is necessary to state the procedure by which a demand on these surveying contracts are created and presented. Upon the return of the true field notes, the last act required to be done by the Deputy Surveyor, the Surveyor-General plats the field notes, and if the work is found correct, then he approves the survey and the plats. The survey being approved by the Surveyor-General, he then computes the amount due under the contract, the rate per mile being stated in the contract, and the field notes

showing the number of miles ran, so that the claim against the Government is the field notes. and from them the amount due is determined by the Surveyor-General, and certified to the Commissioner of the General Land Office.

To obtain money from the United States in any of the methods prohibited by Section 5438 is certainly a fraud upon the Government, and one would defraud the Government if he should secure the payment of a claim in any of the ways therein inhibited. So that if two or more conspired to defraud the Government, and any one of the conspirators used any of the methods inhibited by Section 5438, would commit the offense of conspiracy to defraud.

In the first count, after alleging the conspiracy, it is alleged that the defendants, in pursuance of said conspiracy, procured a contract from the Surveyor-General in the name of one of the defendants, to make a survey of certain lines of certain lands therein described, by which it was stipulated how, when, and in what manner the survey was to be made, and how, when, and to whom returns were to be made.

It is further alleged that in pursuance of said conspiracy, and well knowing the terms of said contract, one of the defendants procured a fraudu-

lent, fictitious and pretended survey of said lands to be made.

And well knowing that said survey had not been made as required by law, and in conformity with the terms of said contract, for the purpose and with the intent of securing the approval of said pretended survey, and securing approved plats and field notes of said pretended survey to be filed in the General Land Office, and for the purpose of securing the Surveyor-General to certify the accounts under said contract and survey, and securing the payment of the contract price from the United States, did cause and procure false, fictitious, and fraudulent field notes of said pretended survey to be made and returned to the United States Surveyor-General, which said fictitious and fraudulent notes purported to be true field notes of the work done in the field, whereas they were not true field notes, but were fictitious and fraudulent, all of which all of said defendants well knew.

By returning to the Surveyor-General false, fictitious and fraudulent field notes representing that the work was done as stipulated in the contract, when in truth it was not, would cause the Surveyor-General to state or certify an account based upon a false and fraudulent claim.

In this view we think the indictment charges an offense under Section 5440, taken in connection with Section 5438.

There being several steps necessary to be taken in order to consummate the crimes enumerated in Section 5438 in a charge of conspiracy to defraud, since the gist of the offense is the conspiracy, the agreement to defraud, it is essential only to allege any one act done by one of the conspirators in pursuance of the conspiracy to evidence the fact that it became operative. The act may in itself be innocent, and it is not necessary that it should appear upon the face of the indictment that such act was calculated to, or would defraud the United States.

Authorities hereinbefore cited.

If it is essential to allege more than one act, then the acts should be alleged in their chronological order, and who is to say how many acts in their chronological order are to be alleged?

When it would require several acts to consummate the fraud, as it would in the case at bar, then it would be necessary to allege all of them necessary to consummate the intention of defrauding in order that the indictment should show upon its face that the acts were calculated

to and would defraud the United States. But the statute provides that any act is sufficient; therefore the first step or act would be sufficient, which of itself it would not result in the intention to defraud.

But according to Judge Deady, in *U. S.* vs. *Owen, supra*, the first act done after the conspiracy was formed consummates the offense of conspiracy and puts the Statute of Limitations in motion.

We therefore submit that all the questions propounded in the division of opinion should be answered in the affirmative and the demurrer overruled, and the defendants put upon their trial.

A. H. Garland

Attorney-General of the United States.

John T. Leary

U. S. Attorney N. D. Cal.

Office Supreme Court U. S.
FILED.
JAN 18 1889
JAMES. H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

MOTION TO ADVANCE CASES.

THE UNITED STATES *vs.* M. F. REILLY.	No. 1036.
THE UNITED STATES *vs.* GEORGE PERRIN ET AL.	No. 1035.
THE UNITED STATES *vs.* J. D. HALL.	No. 1034.

In these cases the defendants submit the following reasons why the motion to advance them should not be granted.

I. The first two of the special reasons present no good ground for advancing the cases. They state only that certain offenses have been committed against the United States by which it has been defrauded, and that for these offenses these defendants with others have been indicted. If these reasons are sufficient for advancing these cases, then all criminal cases in which the United States is claimed to be defrauded could be advanced as well. Such has not been the practice of this court.

II. It is stated in the third reason that there are many civil cases pending in which the United States seeks to re-

cover from the defendants in these indictments the money of which the United States was defrauded by the conspiracies charged in the indictment. It is stated that "the court wherein the civil suits are pending declines to try the civil cases until these and other like criminal cases shall have been disposed of." This statement is not true, as will be shown by documentary evidence which the attorneys in California have telegraphed they will submit to the court if sufficient time be allowed to get it here.

Even if it were true, it is difficult to see what effect upon the civil cases the decisions in the criminal cases would have. Each case must stand upon its own facts, and no judgment which can be rendered on these indictments can be determinative of the question involved in the civil suits. On the other hand the officers of the United States might be spared much unnecessary labor if the civil suits should be tried first.

III. The defendants in these prosecutions have brought suits against the United States on the contracts in reference to which the conspiracies are charged in the indictments. The district attorney has interposed demurrers which have been overruled. The cases are now ready for trial. Defendants here (plaintiffs there) are ready to try these cases without delay. They cannot recover unless they show that the work they contracted to perform was properly done, which it is alleged in the indictment was not properly done. There seems no good reason why the United States should object to trying these cases before the criminal cases are taken up, as in the former the burden of proof to show that the work was well done is upon the plaintiffs. It is submitted that it will be promotive of justice in these cases to delay these prosecutions until the civil suits last referred to have been disposed of.

IV. Hall McCallister, the principal attorney for the defendants in the court below, has recently died. No notice of this motion was received by the attorneys here who are his successors in the cases until last Friday. Mr. McCallister's

associates in San Francisco have not been able to communicate with the attorneys here except by telegraph, and in that way they have requested that this motion be continued until certain evidence which they think important at the hearing of the motion can reach here from San Francisco. There are many defendants in these cases, as well as in the others, involving similar questions, represented by different attorneys, who have had no opportunity for consultation since the death of Mr. McCallister.

V. The suggestion that these cases should be advanced because there is danger of loss of much of the testimony on which the Government relies is entitled to no consideration unless it be shown that this danger is different from that which is met with in all cases where proof is to be made by documents likely to be lost or witnesses likely to die and subject to ordinary human casualties. The unusually large number of witnesses who appeared before the grand jury, and whose names are indorsed upon the indictments, make it very improbable that there will be any serious loss of testimony in these cases.

FRANK H. HURD,
W. H. SMITH,
Of Counsel for Defendants.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, PLAINTIFF,
vs.
GEORGE H. PERRIN ET AL.
No. 1035.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, PLAINTIFF,
vs.
GEORGE H. PERRIN ET AL. } No. 1035.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

MOTION TO ADVANCE.

And now, January 7, 1889, comes the United States by the Attorney-General, and moves the court to advance the above-stated case, to be heard at some date convenient to the court during its present term.

The case is a criminal one, and arises on a certificate of division of opinion as to the sufficiency of the indictment found by the grand jury. There are three counts in the indictment. The questions on which the court divided are:

UNDER FIRST COUNT.

(1) Do the facts stated in the first count of the indictment constitute an offense under section 5440 of

the Revised Statutes, as amended in 1879, 1 Sup. R. S., 484, and section 5438 of the Revised Statutes?

(2) Are sufficient facts stated in the first count of the indictment to make a good count under sections 5440 and 5438, Revised Statutes, or under section 5440 alone, or under section 5440 in connection with any other provision of the statutes?

(3) Does the first count of the indictment sufficiently describe an offense under sections 5440 and 5438, or any other provision of the Revised Statutes, or under section 5440 alone?

(4) Are the means by which the parties conspired and agreed to defraud the United States set forth with sufficient fullness and particularity in the first count of the indictment to constitute a good count in that particular?

(5) Is any overt act performed by any one of the alleged conspirators to effect the object of the conspiracy sufficiently stated in the first count of the indictment to constitute a good count in that particular?

(6) If there is any defect or imperfection in the first count of the indictment, is it in the matter of form only, not tending to the prejudice of the defendant, within the meaning of section 1025, Revised Statutes?

(7) Does the surveying contract set out in the first count of the indictment appear upon all the allegations of the count to be the individual private contract of W. H. Brown, or a contract made in his official character as surveyor-general on behalf of and binding upon the United States?

UNDER SECOND COUNT.

(1) Do the facts stated in the second count of the indictment constitute an offense under section 5440

of the Revised Statutes as amended in 1879 (1 Sup. R. S., 484), and section 5438 of the Revised Statutes?

(2) Are sufficient facts stated in the second count of the indictment to make a good count under said sections 5440 and 5438, Revised Statutes; or under section 5440 alone, or under section 5440 in connection with any other provision of the statutes?

(3) Does the second count of the indictment sufficiently describe an offense under sections 5440 and 5438, or any other provision of the Revised Statutes, or under section 5440 alone?

(4) Are the means by which the parties conspired and agreed to defraud the United States set forth with sufficient fullness and particularity in the second count of the indictment to constitute a good count in that particular?

(5) Is any overt act performed by any one of the alleged conspirators to effect the object of the conspiracy sufficiently stated in the second count of the indictment to constitute a good count in that particular?

(6) If there is any defect or imperfection in the second count of the indictment, is it in the matterof form only, not tending to the prejudice of the defendant within the meaning of section 1025, Revised Statutes?

(7) Does the surveying contract set out in the second count of the indictment appear upon all the allegations of the count to be the individual private contract of W. H. Brown or a contract made in his official character as surveyor-general on behalf of, and binding upon, the United States?

UNDER THIRD COUNT.

(1) Do the facts stated in the third count of the indictment constitute an offense under section 5440

of the Revised Statutes as amended in 1879 (1 Sup. R. S., 484), and section 5438 of the Revised Statutes?

(2) Are sufficient facts stated in the third count of the indictment to make a good count under sections 5440 and 5438, Revised Statutes; or under section 5440 alone, or under section 5440 in connection with any other provision of the statutes?

(3) Does the third count of the indictment sufficiently describe an offense under said sections 5440 and 5438 or any other provision of the Revised Statutes or under section 5440 alone?

(4) Are the means by which the parties conspired and agreed to defraud the United States set forth with sufficient fullness and particularity in the third count of the indictment to constitute a good count in that particular?

(5) Is any overt act performed by any one of the alleged conspirators to effect the object of the conspiracy sufficiently stated in the third count of the indictment to constitute a good count in that particular?

(6) If there is any defect or imperfection in the third count of the indictment, is it in the matter of form only, not tending to the prejudice of the defendant within the meaning of section 1025, Revised Statutes?

(7) Does the surveying contract set out in the third count of the indictment appear upon all the allegations of the count to be the individual private contract of W. H. Brown, or a contract made in his official character as surveyor-general on behalf of, and binding upon, the United States?

The defendants are not imprisoned. The special reasons for the advancement are, that, with reference to this case among others, a report of R. W. Hunter, a special

examiner of the Department of the Interior, indorsed by the Secretary, shows:

(1) That in certain localities of the United States a large number of cases have arisen wherein fraudulent conspiracies were entered into, in which the parties concerned are alleged to have conspired to obtain contracts for the surveying of the public lands; that, without making any actual survey of the lands according to law, they made up false, fictitious, and fraudulent plats, and, on false and fraudulent pay-vouchers, received the money thereon from the United States.

(2) Prosecutions were instituted against some of the alleged conspirators, and three cases of the class are now pending on divisions of opinion in this court, involving the same general character of questions.

(3) That twenty-three (23) civil suits have been brought against the parties to such conspiracies, and, among others, against the defendants in this indictment, and the court wherein the civil suits are pending declines to try the civil cases until this and other like criminal cases shall have been disposed of.

(4) That the amount claimed by the Government in this class of civil cases now pending amounts in the aggregate to $564,247.20.

(5) That there is reason to believe that if the trial of the cases be delayed, there is "danger that much of the evidence on which the Government relies will be lost."

A. H. GARLAND,
Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES
vs.
GEORGE H. PERRIN *et al.* } No. 1035.

This case, like Nos. 1034 and 1036, comes here upon a certificate of division of opinion of the judges of the Circuit Court of the District of California.

The indictment charges that the defendants, George H. Perrin, John McNee, and John H. Benson, on the 2d of December, 1884, at the County of San Francisco, did corruptly, unlawfully, and wickedly conspire, combine, and agree together, and with divers other persons, to defraud the United States out of a large sum of money in manner following: The said defendants, in pursuance of said unlawful conspiracy, did procure a contract by and between the defendant George H. Perrin, a deputy United States surveyor, and W. H. Brown, "then and there being the United States Surveyor General in and for the State of California on the other part," for the survey of certain public lands therein described. The contract is like the one set out in the case of *United States* vs. *Hall*, No. 1034.

The indictment further charges that the defendant Perrin, in pursuance of said conspiracy, and with intent to effect the object of the same, "did cause and procure a fraudulent, fictitious, and pretended survey of the lands described in the aforesaid contract, and hereinbefore described to be made," and did procure false, fictitious, and fraudulent field notes of said false survey to be made and returned to the Surveyor General, which represented that the survey had been made by Perrin in his own person, "whereas in truth and in fact the aforesaid survey had not been made by the said George H. Perrin, United States Deputy Surveyor, or otherwise, in his own proper person, or at all," and which field notes purported to be true field notes of the work actually done in the field, when in fact they were not true field notes, and which represented that the work had been done in strict conformity with the laws of the United States and the surveying manual and instructions, when in fact said survey had not been done in accordance with the same; and which represented that all the corners of the survey had been established and perpetuated in strict accordance with the surveying manual, whereas in fact "all the corners of the aforesaid survey" had not been established and perpetuated in strict accordance with the surveying manual; and which field notes purported to be true field notes, but were not true, but false and fictitious, which all the defendants well knew.

This is the substance of the first count.

The second count is like it, with the addition that by reason thereof "W. H. Brown, Surveyor General, was deceived into approving the said pretended survey and the said false fictitious and fraudulent field

notes, and into stating and certifying the amount accrued to and earned by the said George H. Perrin, defendant herein, under and by the terms of said contract."

The third count is like the first, but adds that the said Perrin made a "final oath to the aforesaid false, fictitious and fraudulent field notes, and did then and there make, sign and execute a certain false and corrupt oath, affidavit and certificate, wherein he, the said George H. Perrin, then and there, knowingly, wilfully, falsely, corruptly and fraudulently did depose, declare, and certify on his oath aforesaid, in substance and effect, he, the said George H. Perrin, then and there being first duly sworn in that behalf by Lee D. Craig, a notary public duly appointed, commissioned and qualified as such in and for the city and county of San Francisco, State of California, then and there being an officer and person competent to administer said oath to the said George H. Perrin, and such oath being then and there taken as aforesaid in a case by a law of the United States, authorized to be administered and taken, that he had in his own proper person made an actual survey," &c., and then proceeds to negative the statements of the affidavit.

This indictment is founded on section 5,440 Revised Statutes, as amended May 17, 1879, so that the section now reads:

> "If two or more persons conspire, either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable

> to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the court." (21 Stat., 4.)

At the outset of the inquiry, it is important to determine what are the necessary averments in an indictment for conspiracy. Is it sufficient to describe the offence in the language of the statute, or must the means by which the conspiracy is to be accomplished and the acts done under it be set out?

Independent of all authority, it would seem that, upon the principles of good common sense, the means and acts done ought to be set out so that the court could judge whether the party charged was guilty of conspiracy and the defendant could be advised of what he was called upon to answer, and so that he could plead his acquittal or conviction in case he was again charged with the same offence.

We think the question has already been determined by this Court, in *United States* vs. *Cruikshank*, 92 U. S., 557. In that case the Chief Justice said:

> "In criminal cases presented under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.'" Amend. VI. "In *United States* vs. *Miller*, 7 Pet., 142, this was construed to mean that the indictment set forth the offence 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and in *United States* vs. *Cook*, 17 Wall., 174, that 'every ingredient of which the offence is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the

definition of an offence, whether it be common law or by statute, 'includes generic terms, it is not sufficient that the indictment should charge the offence in the same generic term as in the definition; but it must state the species,—it must descend to particulars.' 1 Arch. Cr. Pr. and Pl., 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.

"It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny. So, too, it is in some States a crime for two or more persons to conspire to cheat and defraud another out of his property; but it has been held that an indictment for such an offense must contain allegations setting forth the means proposed to be used to accomplish the purpose. This, because, to make such a purpose criminal, the conspiracy must be to cheat and defraud in a mode made criminal by statute; and as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed, in order that the court may see that they are in fact illegal. *State* vs. *Parker*, 43 N. H.

S., 83; *State* vs. *Keach*, 40 Vt., 118; *Alderman* vs. *The People*, 4 Mich., 414; *State* vs. *Roberts*, 34 Me., 32.

"In Maine, it is an offence for two or more to conspire with the intent, unlawfully and wickedly to commit any crime punishable by imprisonment in the State prison (*State* vs. *Roberts*); but we think it will hardly be claimed that an indictment would be good under this statute, which charges the object of the conspiracy to have been 'unlawfully and wickedly to commit each, every, all, and singular the crimes punishable by imprisonment in the State prison.' All crimes are not so punishable. Whether a particular crime be such a one or not, is a question of law. The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defence by motion to quash, demurrer, or plea; and the court, that it may determine whether the facts will sustain the indictment. So here, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, etc. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court, not the prosecutor. Therefore, the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear, that is to say, appear from the indictment, without going further, that the acts charged will, if proved, support a conviction for the offence alleged. But it is needless to pursue the argument further. The conclusion is irresistible, that these counts are too vague and general. They lack the certainty and precision required by the established rules of criminal pleading. It follows that they are not good and sufficient in law. They are so defective that no judgment

of conviction should be pronounced upon them. The order of the Circuit Court arresting the judgment upon the verdict is, therefore, affirmed; and the cause remanded with instructions to discharge the defendants."

The question thus decided is no longer an open one in this court. There are a great many cases besides those cited in the above opinion which are in accord with the doctrine there laid down. We cite some of them:

Lambert vs. *The People*, 9 Cow., 578;
People vs. *Brady*, 56 New York, 190;
Commonwealth vs. *Eastman*, 1 Cush., 224;
Hartman vs. *Com.*, 5 Barr, 65;
United States vs. *Walsh*, 5 Dillon, 58;
Commonwealth vs. *Hunt*, 4 Met.;
United States vs. *Goldberg*, 7 Bissell, 179.

We shall now assume that the indictment must set out the means and the acts relied upon, and that, upon the case thus made, it must appear that the United States would be defrauded.

The inquiry arises whether this indictment contains such proper and specific averments as to establish the fact that the government would be defrauded upon the case made.

We maintain that it would not—

1. The contract is not alleged to have been made with the said W. H. Brown in his official capacity.

The indictment says it was made with "W. H. Brown, then and there being the United States Surveyor General in and for the State of California."

That this is a material allegation no one can doubt.

But it is said, in argument, that it sufficiently appears from other parts of the indictment that the contract was made with him officially. In other words, it is inferred from other parts of the indictment that Brown made the contract in his official capacity. We are content to take the rule as laid down by this Court in the Cruikshank case. The court said:

> "*Every thing essential must be charged positively, and not inferentially. The defect is not in form, but in substance.*" p. 556.

2. It does not appear from this indictment that the contract was not for surveys which would not and could not be a charge against the United States, and therefore the government could not be defrauded by them. As we have shown in No. 1034, there is a class of surveys where the settlers pay for them (R. S., Sec. 2401.) This section being a part of the act governing surveys, it was the duty of the pleader to negative the provisions of that section. This Court said, in *United States* vs. *Cook*, 17 Wall., 174:

> "Offences created by statute, as well as offences at common law, must be accurately and clearly described in an indictment, and if they cannot be, in any case, without an allegation that the accused is not within an exception contained in the statute defining the offense, it is clear that no indictment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offence is composed.".

3. This indictment is defective because nearly all of its allegations are made upon the assumption that the surveying manual and the surveying instructions of the Commissioner of the General Land Office are a part of the law of the case, and that therefore this court is bound to take judicial notice of them.

The Surveying Manual and Instructions are no part of the law. They are by law made a part of every *contract*—that is all. And it is just as necessary to allege in the indictment what their provisions are in reference to making contracts by the surveyor general or approving accounts, or making and establishing corners and the like as it is to allege *any other part* of the contract.

With this principle in view the defect in this indictment will more clearly appear.

4. The allegations of the overt act are so general that the defendants cannot know with what specific acts they are charged. As an illustration of what we mean, take a single subject, that of the field notes and of making and establishing corners.

The indictment charges that Perrin did not make true field notes and did not mark and establish all the corners in accordance with the surveying manual. Could anything be more indefinite? In what ~~relied~~ were the field notes not true? In what particular did they fail to comply with the instructions? What corners were not established and perpetuated?

It is not avered that every entry in the field notes was a false one nor that none of the corners were established. The defendants therefore can have no knowledge what defects in the field notes will be

~~valid~~ on, nor what corners it is claimed were not established.

In *United States* vs. *Walsh*, 5 Dillon 58, the court held an indictment like this void. It was founded on R. S. 5440. The court said:

> "This is an indictment for conspiracy to defraud the United States, and the American decisions are uniform to the point that the means by which the fraud is to be effected must be described in some part of the indictment with certainty. This indictment does not advise the defendants what they will have to meet and they cannot tell from it which of the multitudious vouchers they have certified will be relied on by the government to establish the charge."

5. The affidavit referred to in the 3rd count is not such an affidavit as makes the defendants liable.

Because (1) it is not properly pleaded, it should have been set out in words instead of in substance and effect. See authorities cited in No. 1034. (2) It contains allegations for which there is no legal requirement; it recites that Perrin had in his own proper person made the survey. There is no statute requiring any such sworn statements. If there is any pretense for such a requirement it must, we suppose, be found in the surveying manual. But that manual is not before the court, its contents, have not been alleged in this indictment, and the court can therefore know nothing about them. The statute prescribes the final oath to be taken by a deputy surveyor, It is prescribed in R. S. 2231:

> "The surveyor general * * * shall require each of the deputies to take and subscribe an oath that the *surveys have been faithfully*

and correctly executed, according to law and the instructions of the surveyor general."

There is no authority in any one to enlarge this oath or to include in it any matters not contained in this section of the statute. It does not require the survey to be made by the deputy surveyor in person. He may have employed some one else to make it and may have believed that it was "faithfully and correctly" done, although some errors may have occured in making the corners and field notes.

6. It was sworn to before a notary public, an officer who had no authority to administer such an oath.

United States vs. *Curtis*, 107 U. S., *supra*.

We ask that the first six questions be answered in the negative, and the seventh that the contract is the individual contract of Brown.

FRANK H. HURD,
WALTER H. SMITH.
Atty's for deft's.

March 16, 1889.

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES
vs.
GEO. H. PERRIN ET AL.
No. 1035.

Additional Brief for Defendants.

WM. M. STEWART,
For Defendants.

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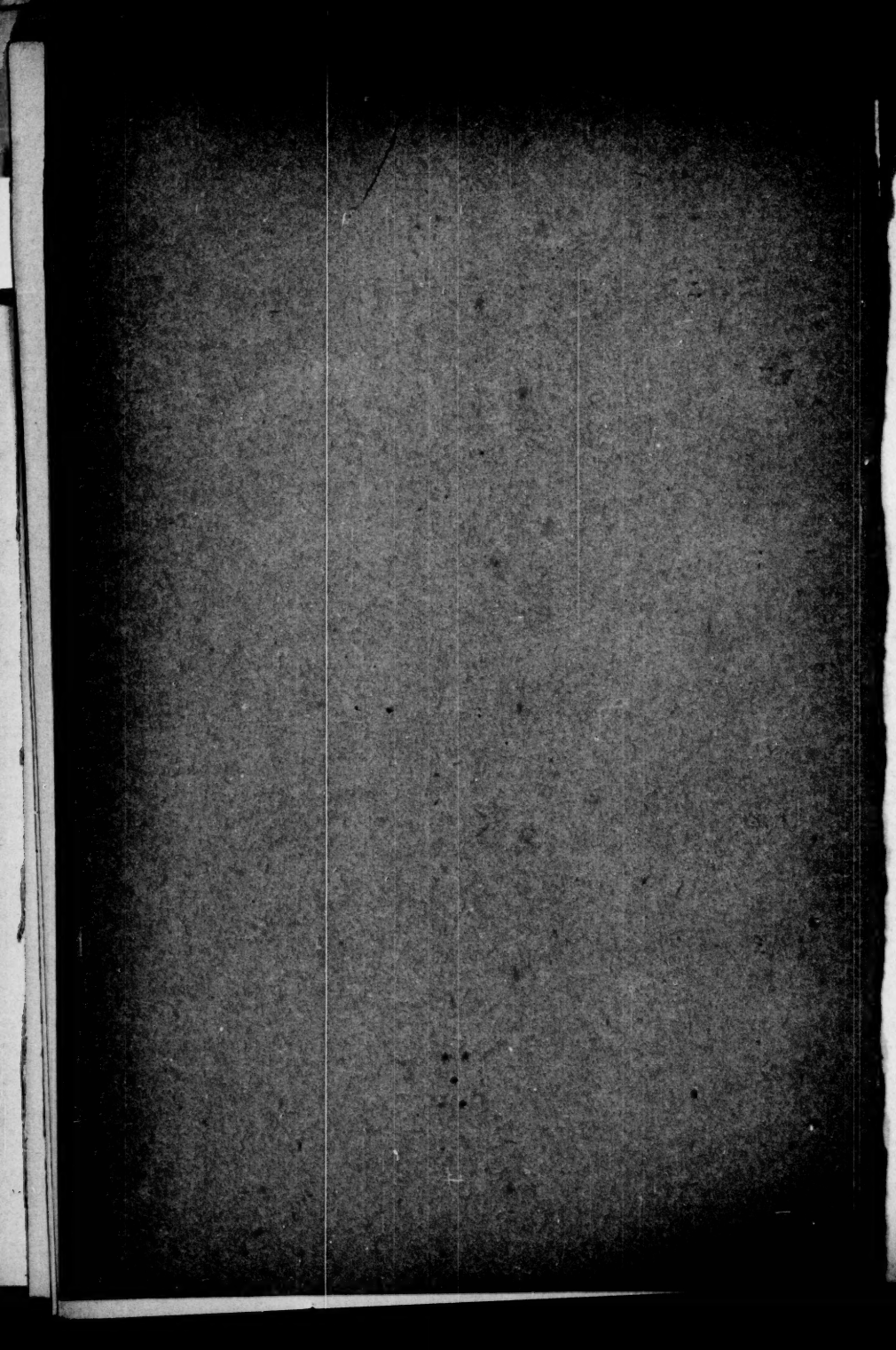

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES
v.
GEO. H. PERRIN ET AL.
No. 1,035.

ADDITIONAL BRIEF FOR DEFENDANTS.

On certificate of division in opinion of the Judges of the Circuit Court of the District of California.

There are three counts in the indictment in this case.

The first question upon which the Judges differed is the same as to each count, and is as follows:

"Do the facts stated in the first count of the indictment constitute an offense under section 5440 of the Revised Statutes, as amended in 1879, 1 Sup. R. S. 484, and section 5438 of the Revised Statutes?"

The answer to this question will determine the sufficiency of the indictment.

Section 5438, so far as it relates to conspiracy, provides that—

"Every person who * * * enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, * * * shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand or more than five thousand dollars."

Section 5440, as amended by the act of May 17, 1879, provides:

"If two or more persons conspire either to *commit any offense* against the United States *or to defraud* the United States *in any manner, or for any purpose*, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court." (U. S. Stat., vol. 21, p. 4.)

Section 5440 has modified, if not entirely repealed, that part of section 5438 above quoted.

In *United States* v. *Reichert* (32 Fed. Rep., 142), Mr. Justice Field said:

"I am of opinion that section 5440 Rev. St., amended by the act of May 17, 1879 (21 St., 4), qualifies the provisions of section 5438; and that a conspiracy to defraud the United States, or to commit any other offense against the United States, is not, of itself, an indictable offense, unless the conspiracy be followed by some act in furtherance of it, that is, to effect its object. Section 5440 applies to conspiracies to defraud the United States *in any manner or for any purpose*, and, of course, embraces the particular conspiracy mentioned in section 5438—to defraud the Government of the United States by 'obtaining or aiding to obtain the payment or allowance of any false or fraud-

ulent claim.' As, under section 5440, the conspiracy to defraud must be followed by some act to effect that object, to constitute a public offense, it would seem that, to the extent in which the section differs in that particular from the offense of defrauding the United States mentioned in the preceding section (5438), it must be held to qualify and amend that section. Were this not so, we should have a general provision that in case of a conspiracy to defraud the United States *in any manner, or for any purpose*, it would be necessary to show the doing of some act to effect its object by one or more of the conspirators to constitute the offense, with a previous provision that, in case of a conspiracy to defraud the United States *in a specified way*, there would be no necessity of showing any act to carry the conspiracy into effect. Consistency is given to the statute by treating the latter section as qualifying the preceding one." (P. 145.)

The conspiracy charged in each count of the indictment is substantially the same, to wit:

"That *George H. Perrin, John McNee, and John A. Benson*, late of the district of California, heretofore, to wit, on the second day of December, in the year of our Lord one thousand eight hundred and eighty-four, at the city and county of San Francisco, State and district of California, and within the jurisdiction of this honorable Court, *did unlawfully, corruptly, and wickedly conspire, combine, and agree together* and with divers other persons to the said grand jurors unknown *to defraud the United States of a large sum of money*, to wit, the sum of four hundred and ninety-two dollars, lawful money of the United States, *by the means and in the manner following, that is to say, that they*, the said *George H. Perrin, John McNee, and John A. Benson*, in pursuance of the unlawful conspiracy, confederation, and agreement aforesaid, had made and entered into for the purpose of defrauding the United States as aforesaid, *did*, then and there, *procure, secure, and cause to be entered into a contract by and between the said defendant, George H. Perrin, then and there being deputy*

United States surveyor in and for the State of California, on the one part, *and W. H. Brown, then and there being the United States Surveyor-General* in and for the State of California, on the other part, whereby the said defendant, *George H. Perrin*, in his said capacity aforesaid, in substance and effect *undertook, agreed, and promised*," &c.—

Setting out somewhat defectively the substance of an ordinary contract to survey public lands.

"*By the means and in the manner following, that is to say*," are apt words to show that the procurement of the contract to survey public lands in the name of defendant Perrin was the means and manner by which the United States was to be defrauded. The procurement of the contract is all the indictment shows the defendants agreed to do. No other combination or agreement is charged.

The contract (the substance of which is already set forth) is between Deputy Surveyor Perrin and W. H. Brown, "*then and there being United States Surveyor-General*," &c., and whether it is a contract between Perrin and the United States, or Perrin and Brown individually (a question to be hereafter considered), it is in either case a most harmless and inoffensive instrument.

The subsequent parts of the several counts of the indictment following the allegations showing what the three defendants did jointly relate solely to the individual acts of defendant Perrin, and whether his acts were criminal or otherwise is immaterial. The only purpose of the charge against Perrin individually is to comply with the statute, which requires, in addition to the combination or agreement, some act by one or more of the parties to effect the object of the conspiracy. A conspiracy is separate from and independent of the overt acts, which under the statute must follow.

In the case of *United States* v. *Britton* (108 U. S., 199), the Court said:

"This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiæ*, so that before the act is done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that in an indictment for conspiracy under section 5440 the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy." (Reg. *v.* King, 7 Q. B., 782; Commonwealth *v.* Shedd, 7 Cush., 514. (204–5.)

If it were true that the conspiracy in the case at bar was formed to defraud the United States by making fraudulent surveys and field-notes and presenting them to the proper officers for the purpose of obtaining money from the United States, and that the contract was procured to be used for such fraudulent purposes, there was no difficulty in charging this in the indictment. This is not done. Nothing is set forth in the indictment to indicate by what means or in what manner the defendants, Perrin, McNee, and Benson, proposed to defraud the United States, except the making of a legal and proper contract.

The gist of the offense of conspiracy is the unlawful confederacy to do an unlawful act, or to do a lawful act by unlawful means.

4 American and English Encyclopædia of Law, 589, and cases cited.

Whether or not it was necessary to allege the manner by which, or the purposes for which, the defendants pro-

posed to defraud the United States is immaterial. Such manner and purpose, when set forth in an indictment, determines the character of the alleged combination or conspiracy; and if the object designed by the combination or conspiracy was lawful and proper, the indictment is bad.

The allegations in this indictment as to what constituted the conspiracy are particular and specific, and on the trial of the case the evidence must be confined to them.

Comm. *v.* Harley, 7 Metc., 506.
Comm. *v.* Kellogg, 7 Cush., 473.

See also—

State *v.* Hadley, 54 N. H., 224.
Randolph *v.* State, 14 Ind., 232.

Counsel do not attempt to discuss the charge as made in the indictment, to wit, that Perrin, McNee, and Benson conspired to defraud the United States by procuring a contract to survey public lands, but select that portion of the indictment which charges a conspiracy to defraud the United States, and ignore the facts stated in the indictment showing the mode and manner by which the United States was to be defrauded. If they were allowed to remodel and change the indictment in the manner indicated it would still be insufficient. To charge that defendants unlawfully and wickedly conspired to defraud the United States is not sufficient.

This indictment is found under the second clause of Sec. 5440 of the Revised Statutes, which makes it a criminal offense for two or more persons to conspire to defraud the United States *in any manner or for any purpose.* If there was only one mode or manner by which the United

States could be defrauded, and if the conspirators could have only one purpose in defrauding the United States, there might be some force in the argument that a general allegation of conspiracy to defraud the United States would be sufficient; but the methods which may be devised and the purposes which may be designed to defraud the United States are so multifarious that a general charge of conspiracy to defraud the United States does not furnish the accused with such a description of the charge against them as will enable them to make their defense, or avail themselves of a conviction or acquittal for protection against further prosecution for the same cause; nor does it inform the court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction, if one should be had.

Such an indictment would be bad under the decision of this Court in the case of the United States *v.* Cruikshank (92 U. S., 557), which is as follows:

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In *United States* v. *Mills* (7 Pet., 142), this was construed to mean, that the indictment set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and in *United States* v. *Cook* (17 Wall., 174), that 'every ingredient of which the offence is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment should charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars.' (1 Arch. Cr. Pr. and Pl., 291.) The object of the indictment is, first, to furnish the accused with such a description of the charge against him as

will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.

"It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny. So, too, it is in some States a crime for two or more persons to conspire to cheat and defraud another out of his property; but it has been held that an indictment for such an offense must contain allegations setting forth the means proposed to be used to accomplish the purpose. This, because, to make such a purpose criminal, the conspiracy must be to cheat and defraud in a mode made criminal by statute; and as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed, in order that the court may see that they are in fact illegal. (*State* v. *Parker*, 43 N. H., 83; *State* v. *Keach*, 40 Vt., 118; *Alderman* v. *The People*, 4 Mich., 414; *State* v. *Roberts*, 34 Me., 32.)

"In Maine it is an offense for two or more to conspire with the intent, unlawfully and wickedly, to commit any crime punishable by imprisonment in the State prison (*State* v. *Roberts*); but we think it will hardly be claimed that an indictment would be good under this statute, which charges the object of the conspiracy to have been 'unlawfully and wickedly to commit each, every, all and singular, the crimes punishable by imprisonment in the State prison.' All crimes are not so punishable. Whether a particular crime be such a one or not is a question of law. The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he

may decide whether he should present his defense by motion to quash, demurrer, or plea; and the court, that it may determine whether the facts will sustain the indictment. So here the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, &c. All rights are not so granted or secured. Whether one is so or not, is a question of law, to be decided by the court, not the prosecutor. Therefore, the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear—that is to say, appear from the indictment, without going further—that the acts charged will, if proved, support a conviction for the offense alleged. But it is needless to pursue the argument further. The conclusion is irresistible, that these counts are too vague and general. They lack the certainty and precision required by the established rules of criminal pleading. It follows that they are not good and sufficient in law. They are so defective that no judgment of conviction should be pronounced upon them. The order of the circuit court arresting the judgment upon the verdict is, therefore, affirmed, and the cause remanded with instructions to discharge the defendants."

The allegation in folio 9 that all of the defendants—Perrin, McNee, and Benson—then and there well knew the matters alleged against Perrin does not alter the case. It is not stated that they combined to do the acts so charged, or that they agreed to such acts, or even approved of them. The mere recital of their knowledge is no charge against McNee and Benson, nor does it tend to establish a conspiracy. Mere passive cognizance or a mere agreement or presence on the occasion of the conspiracy itself, or a knowledge of its existence, is insufficient, much less the mere knowledge of the existence of the overt acts.

Evans *v.* People, 90 Ill., 384.

Miles *v.* State, 58 Ala., 390.

U. S. *v.* Johnson, 26 Fed. Rep., 682.

It does not appear from the indictment that any act which could possibly be effective was performed to carry out the object of the conspiracy as required by the statute. If all that is alleged in the indictment were true, the United States could not have been defrauded. The indictment does not show that there was any contract between Perrin and the United States, and without such contract any pretended survey or field-notes that he might manufacture would be as useless and ineffectual as blank paper in procuring money from the United States.

The allegation is that the defendants "did then and there procure, secure, and cause to be entered into a contract by and between the said defendant George H. Perrin, then and there being a deputy United States surveyor in and for the State of California, on the one part, and W. H. Brown, then and there being the United States surveyor-general in and for the State of California, on the other part," and there the charge of conspiracy against the defendants ends.

If, as a matter of law, the surveyor-general had power to make a contract for the survey of public lands which would be binding upon the United States, there is nothing in the indictment to show that he attempted to do so. On the contrary, the allegation is that the contract was made with W. H. Brown, who was at the time surveyor-general. The recital of that fact was merely *descriptio personæ*, and has no more to do with the contract than if it had recited his place of residence.

The form of the contract prescribed by the instructions of the Commissioner of the General Land Office, which he is authorized by law to make, is as follows, to wit:

"This agreement made this day , 18 , by and between , surveyor-general of the United

States for , acting for and in behalf of the United States, of the one part, and , deputy surveyor, of the other part, (a bond for the faithful performance of this and other contracts having been executed by the said , deputy surveyor, as principal, and , as sureties, and dated the day of , 18), witnesseth," etc. (The Public Domain, p. 586.)

The contract is between Perrin and Brown on his own behalf, and not for or on behalf of the United States.

Packard *v.* Nye, 2 Metc., 47.
Simonds *v.* Heard, 23 Pick., 121.
Tippets *v.* Walker, 4 Mass., 595.
Hille v. *Bannester*, 8 Conn., 5.
Shelton *v.* Darling, 2 Conn., 435.
Barker *v.* Mechanics' Fire Ins. Co., 3 Wend., 94.
Fogg *v.* Virgin, 19 Maine, 352.
Fask *v.* Roberts, 1 B. Mon., 201.
Leach *v.* Blad, 8 Mead & M., 221.
Fisk *v.* Eldridge, 12 Gray, 474.
Haverhilt Neat Ms. Co. *v.* Newhall, 1 Allen, 130.
Bunnill *v.* Jones, 3 B. & A., 47.
Eaton *v.* Bell, 5 Do., 34.
Moss *v.* Livingston, 4 Comst., 208.

It is not stated in the indictment that the surveyor-general had any right or power to receive or approve of the alleged survey and field-notes, or that there was any legal authority in the Commissioner of the General Land Office to receive, file, or approve such surveys, or how the alleged acts of Perrin could enable the defendants to obtain money from the United States. It is fair to presume that the contract, as stated in the indictment, was a private contract, and that the grand jury were unable to find that either the surveyor-general or the Commissioner of the

General Land Office had any official authority in the matter.

If the surveyor-general had no official authority to receive or approve the alleged survey, its presentation to him would have no tendency to defraud the United States, and we must assume that he had no such authority, because it is not stated in the indictment. This is a fatal defect.

In *United States* v. *Reichert* (17 Fed. Rep., 145) Mr. Justice Field, in discussing an indictment for conspiracy under section 5440 (similar in many respects to the indictment in this case), used the following language with regard to the point now under consideration:

"But I agree with the circuit judge that the absence of any averment of authority in the surveyor-general to allow and approve the claim which was to be presented to him is, of itself, a fatal defect."

In conclusion, we beg leave to suggest that this indictment is an attempt to punish a contractor for Government surveys criminally for non-fulfilment of his contract. It is not pretended that there was not an attempt at performance. On the contrary, the various negative pregnants in the indictment admit that some kind of a survey was made. For example, it is alleged in each of the various counts that—

"In truth and in fact all the corners of the aforesaid survey of the lands last hereinbefore described had not been established and perpetuated in strict accordance with the surveying manual of printed instructions and in the specific manner in the aforesaid field-notes described."

To defend against this indictment would cost more than

the original survey; for the defendants will be compelled to be prepared to show that every line was run and marked, every monument erected, every corner established, and all other things done connected with the surveys required by the very minute regulations of the Department.

It would be impossible for a poor man to defend himself against such an indictment, whether guilty or innocent. Ample remedies are provided by statute to guard against fraudulent or defective surveys, such as bonds in double the amount of the money to be paid for the survey, affidavits of chainmen and assistants, and the final affidavit of the deputy-surveyor himself, to the correctness of his survey; and it is the duty of the district attorney to prosecute on the bond for false or erroneous surveys. (Revised Statutes, sections 2230, 2231, 2232.)

If this indictment is sufficient, nearly every contractor for Government work would be subject to criminal prosecution. Such oppressive proceedings are contrary to law and good policy, and illustrate the wisdom and the necessity of the rule in the case of *The United States* v. *Cruikshank*, *supra*.

WM. M. STEWART,
For Defendants.